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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 511

JOHN W. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

FILED NOVEMBER 4, 1942.

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INDEX.

	Original	Print
Record from D. C. U. S., District of Minnesota	1	1
Stipulation as to record on appeal (omitted in printing)	1	
Petition (complaint)	4	1
Exhibit "A"—Report and order of I. C. C., Docket No. MC-70830, May 13, 1941	19	14
Exhibit "B"—Order of I. C. C. denying petition for reconsideration	33	25
Exhibit "C"—Order of I. C. C. modifying its order of May 13, 1941	34	25
Order for hearing	35	26
Answer of United States of America	38	27
Answer of Interstate Commerce Commission	42	28
Exhibits "A" & "B"—Report and order of I. C. C., Docket No. MC—70830, May 13, 1941 (omitted in printing)	46	

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—4269

	Original	Print
Record from D. C. U. S., District of Minnesota—Continued		
Plaintiff's exhibit "B"—Transcript of hearing before Interstate Commerce Commission in Docket No. MC—70830	60	31
Caption and appearances	60	31
Colloquy	63	32
Testimony of John F. Noble	72	38
Fred Herbrand	148	85
Colloquy	152	88
Testimony of John F. Noble (recalled)	165	96
Colloquy	228	136
Testimony of John F. Noble (resumed)	235	140
A. J. Metzger	396	252
J. H. Albrecht	474	304
W. J. Glendenning	490	315
F. F. Logman	503	324
Plaintiff's Exhibit "F"—Certified copy of certificate of change of objects of Swift and Company	513	330
Opinion, Bell, J.	518	332
Findings of fact and conclusions of law	536	346
Order dismissing complaint	541	349
Petition for appeal	542	350
Order allowing appeal	543	350
Assignments of error	545	351
Petition for order staying final decree pending appeal	549	354
Order staying effective date of order of Interstate Commerce Commission	552	357
Citation (omitted in printing)	554	
Notice to Attorney General of Minnesota	557	357
Clerk's certificate (omitted in printing)	559	
Statement of points to be relied upon and designation of parts of record to be printed	561	358
Order noting probable jurisdiction	571	365

[fols. 1-4]

IN DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MINNESOTA, THIRD DIVISION

JOHN F. NOBLE, Doing Business as Noble Transit Company, Plaintiff,

vs.

UNITED STATES OF AMERICA, and, INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed November 8, 1941

The plaintiff respectfully states to the Court and alleges:

I

That this action is brought under and by virtue of the Due Process Clause of the Fifth Amendment to the Constitution of the United States and of the provisions of the Transportation Act of 1940, and Sections 24 and 209 of the Judicial Code (28 U. S. C. A., Sections 41, 43, 44 and 45), and has for its purpose enjoining, suspending and setting aside an order of the Interstate Commerce Commission, in a proceeding wherein John F. Noble, doing business as Noble Transit Company, seasonably filed appropriate application with the Interstate Commerce Commission as hereinafter more fully appears, and hence is within the jurisdiction confided to this court by the law herein mentioned.

II

That plaintiff is an individual residing in the Judicial District of Minnesota, doing business as Noble Transit Company, with his main business office at South St. Paul, Dakota County, Minnesota. That he is a carrier by motor vehicle engaged in interstate operations over the public highways in the States of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, transporting goods and general [fol. 5] commodities for shippers under contract, and that he was in bona fide operation as aforesaid on and prior to the 1st day of July, 1935, and ever since has been engaged under contract with shippers in the transportation by motor vehicle of goods and commodities in interstate commerce within the territory herein set forth.

III

That the plaintiff, pursuant to law, duly filed his application as a contract carrier (MC 70830) with the Interstate Commerce Commission, one of the defendants herein, within the time provided by law, namely, on the 10th day of February, 1936, wherein he sought a permit from the said Commission to operate as a contract carrier for the transportation of goods in interstate commerce over numerous irregular routes within the territory claimed and described; and by application as a common carrier (MC 70831) filed with the said Commission on the same day, sought a certificate of public convenience and necessity authorizing the petitioner to operate as an irregular carrier for the transportation of general commodities, with certain exceptions, over a regular route between Chicago, Illinois, Milwaukee, Wisconsin, and Saint Paul and Minneapolis, Minnesota. That the aforesaid applications were filed under Sections 209 and 206, respectively, of what was then known as The Motor Carrier Act of 1935, and what is now, by amendment of 1940, known as The Interstate Commerce Act, Part II and the applicable provisions of Section 17, Part I, of said Act. That said applications were made and filed on forms prepared and supplied by the Interstate Commerce Commission and which applications, or either of them, provided for the alternative of either a permit as a contract carrier or a certificate as a common carrier. That the plaintiff, after filing his said application as a common carrier (MC 70831), labored under the misapprehension that his operations under the said applications were all included in his application as a contract carrier (MC 70830), and therefore requested the said Commission to dismiss his application as a common carrier, and that said Commission, Division 5, ordered said dismissal on the 14th day of October, 1938.

[fol. 6] IV

That the petitioner was registered under the Code of Fair Competition for the Trucking Industry on November 15, 1934, and, as such, under Section 209 (a) of the Motor Carrier Act, amended in 1940, as the Interstate Commerce Act, Part II, was in bona fide operation as a contract carrier by motor vehicle.

V

That, by reason of plaintiff's operations as a carrier by motor vehicle as aforesaid, your petitioner is and was at all times entitled, as a matter of law, under the provisions of The Motor Carrier Act of 1935, and subsequent amendments, in 1940, The Interstate Commerce Act, Part II, and the applicable provisions of Section 17, Part I, of the Act, with particular reference to the clause thereof known as "grandfather" clause, to have issued to him, by the defendant Interstate Commerce Commission, a permit as a contract carrier, or a certificate of public convenience and necessity as a common carrier, authorizing territorial operations as aforesaid without limiting or restricting him to operations for specific contract shippers and specific commodities for said shippers, or class of shippers, and to specific points and places within the territory claimed by him by virtue of bona fide operations prior to July 1, 1935.

VI

That, upon the filing of said application as a contract carrier (MC 70830) by the plaintiff, the matter was referred for hearing to Examiner C. J. Peterson, District No. 9 of the said Commission, at Minneapolis, Minnesota, and was heard by said Examiner on the 21st, 22nd and 23rd days of September, 1938.

VII

That the said Examiner arbitrarily, capriciously and unlawfully, and over the objections and exceptions of the plaintiff, excluded at said hearing certain relevant and competent testimony on behalf of the plaintiff as to his carriage contracts entered into, both prior and subsequent to July 1, 1935. That, on the 20th day of November, 1939, [fol. 7] the plaintiff applied to the defendant Commission for a review of the Examiner's rulings, which application was denied by the Commission on the 29th day of December, 1939.

VIII

That, on the 5th day of December, 1939, the plaintiff received a copy of the Findings and Recommended Order of said Trial Examiner, which Findings and Order, improperly, arbitrarily, capriciously and unlawfully limited

and restricted the plaintiff's operations to certain types of commodities, certain class of shippers, and to certain points and places within the territory claimed by him in his operations. That the plaintiff took proper and legal exceptions before the defendant Interstate Commerce Commission to said Findings and Recommended Order of the Examiner, and repeated his prayer for review and further hearing and oral argument. That these exceptions and prayer by the petitioner were denied by Division 5 of the Commission on the 16th day of March, 1940.

IX

That, thereafter, on the 13th day of May, 1941, Division 5 of the Commission made and filed its further Findings and Order affirming, in effect, the Findings and Recommended Order of the Examiner, in violation of the legal rights of the plaintiff and contrary to law. That a true and correct copy of said Findings and Order of Division 5 of the Commission is attached hereto and made part hereof, marked Exhibit "A".

X

That, on the 11th day of August, 1941, the plaintiff filed with the defendant Interstate Commerce Commission his petition for reconsideration by the entire Commission of said Findings and Order of Division 5, praying for oral argument and permission to file briefs in support thereof. That, on the 6th day of October, 1941, the Commission made said Denial Order of May 13, 1941, final by its Order denying said petition for Reconsideration. That a true and correct copy of said Order, denying said Petition for Reconsideration, is hereto attached and made part hereof, marked Exhibit "B".

[fol. 8]

XI

That the plaintiff has now exhausted all his remedies afforded him by law in the proceedings before the Commission.

XII

That the effective date of said Denial Order of May 13, 1941, has been extended by the Interstate Commerce Commission to the 12th day of November, 1941. That a true and

correct copy of said Extension Order is hereto attached and made part hereof, marked Exhibit "C".

XIII

That the defendant Interstate Commerce Commission has improperly, arbitrarily, capriciously and unlawfully construed the language, words, terms and provisions of The Motor Carrier Act of 1935, amended, in 1940, as The Interstate Commerce Act as hereinbefore set forth, which clearly entitles any carrier who was in bona fide territorial operation as a contract carrier, or common carrier, by motor vehicle on July 1, 1935, and since that time over regular or irregular routes within the territory for which application is made within the purview and scope of said Act, to a permit, or a certificate, from the Commission without requiring further proof that the same is consistent with the public interest, or that public convenience and necessity will be served by such operations, and without further proceedings if the application is made within the time provided by the Act.

XIV

That, specifically, the defendant Interstate Commerce Commission has improperly, arbitrarily, capriciously and unlawfully construed the words and terms "bona fide", "business" and "scope" as employed in The Motor Carrier Act of 1935, amended, in 1940, as The Interstate Commerce Act, Part II; and has improperly, arbitrarily and unlawfully sought to confine, restrict and limit the "bona fide" business of the plaintiff and the "scope" of his territorial operations to certain particular commodities, certain shippers or class of shippers, and to limited and certain points and places within the territory claimed by him in his opera- [fol. 9] tions, in violation of the plaintiff's legal rights, not in keeping with the purpose of the Act, and contrary to the manifest intent of Congress, and the plain and ordinary meaning of said words in the English language.

XV

That, even if the defendant Interstate Commerce Commission has interpreted the words and terms "bona fide", "business" and "scope" used in said Act according to the intent of Congress and conformable to the usual and reason-

able construction given to such words and terms, said Commission has improperly, arbitrarily, capriciously and unlawfully ignored or failed to consider the bona fide territorial operations and scope of the business of the plaintiff by limiting and restricting them to unreasonable and unwarranted bounds and in erroneously classifying the vast business of the shippers the plaintiff served and is serving.

XVI

That said Denial Order of May 13, 1941, by the Commission, in substance and effect, improperly, arbitrarily, capriciously and unlawfully restricts the right of the plaintiff to substitute or add contracts with shippers other than packing houses and food canneries.

XVII

That said Denial Order, in substance and effect, erroneously and capriciously defines the term "contract carrier by motor vehicle" and limits the scope thereof contrary to the purpose of the Act and the intent of Congress in its passage, and erroneously, capriciously and unlawfully limits that definition in a manner that is calculated to give, and does in fact give, common carriers of property a virtual, unlawful monopoly on the motor transportation business in the United States, and does in fact and effect relegate and reduce contract carriers to the status of private carriers.

XVIII

That said Denial Order improperly, arbitrarily, capriciously and unlawfully discriminates against the plaintiff as a contract carrier by motor vehicle and deprives him of the equal protection of the law provided for by Congress [fol. 10] for both contract carriers and common carriers in The Motor Carrier Act and its amendment, The Interstate Commerce Act, Part II.

XIX

That said Denial Order contravenes the national transportation policy as declared by Congress in said Act, in that it denies to plaintiff fair and impartial regulation as a contract carrier; fails to recognize and preserve the in-

herent advantages of contract carriage by the plaintiff to shippers in the territory wherein the plaintiff carries on his operations and has carried them on for many years; fails to promote and foster a safe, adequate, economical and efficient transportation service contemplated by the Act, and improvidently and unlawfully curtails and restricts the development of contract carriage as a legitimate business in the co-ordination and preservation of the national transportation system by highway, which was designed and intended by Congress to adequately meet the needs of the commerce of the United States and of national defense.

XX

That the said Denial Order further contravenes and conflicts with the national transportation policy declared by Congress in said Act, in that the Commission has failed improvidently and unlawfully to give any consideration to the fact that the United States is now in dire need of transportation facilities for national defense.

XXI

That said Denial Order of May 13, 1941, by Division 5 of the Commission, plaintiff's Exhibit "A", was not made by the Trial Examiner C. J. Peterson who heard the evidence, nor by the members of the Commission then constituting Division 5 of the Commission, but was made by another examiner, one whose name is unknown to the plaintiff, who did not hear the evidence nor observe the witnesses, and said Division 5 thereafter improperly, arbitrarily, capriciously and unlawfully refused to grant to the plaintiff the right of oral argument, or to inform plaintiff of the proposed form, terms or conditions of said Denial [fol. 11] Order of May 13, 1941, and, upon plaintiff's appeal or petition for reconsideration, the entire Commission improperly, arbitrarily, capriciously and unlawfully refused and declined to permit plaintiff the right to make and file a supporting brief in writing, or to present oral argument in his behalf, all contrary to and in violation of the provisions of said Interstate Commerce Act relating to (fair) hearings, and of the due process clause of the Fifth Amendment of the Constitution of the United States.

XXII

That there was no evidence before the Trial-Examiner, and there is none before the Commission, showing that any of the operations of the plaintiff were or are unlawful, and the characterization of plaintiff's operation under the terms of a contract with Kraft-Phoenix Cheese Company entered into on June 1, 1935, and where operations were subsequently conducted in good faith thereunder, and pursuant thereto as

"being beyond the scope of applicant's 'grandfather' rights * * * the service rendered this shipper has constituted an unauthorized extension of operations."

is arbitrary, capricious and unlawful, contrary to and in plain violation of the specific language of Congress, and a plain and obvious denial of plaintiff's rights to make such contracts prior to the effective date of said Act and to subsequently render performance thereunder.

XXIII

That, in support of plaintiff's allegations herein, your plaintiff respectfully and specifically represents to the Court:

(1) That plaintiff is a graduate of the University of Minnesota, College of Engineering. He began his interstate motor transportation business in September, 1934, obtaining a common carrier certificate and a contract carrier permit from the States of Minnesota and Wisconsin. No such permits or certificates were then required by the States of Illinois, Iowa or North Dakota. On the effective or 'grandfather' date plaintiff was in bona fide operation as an interstate motor carrier of property privileged to carry property throughout the territory herein described. He also transported general commodities between Chicago, Illinois, and St. Paul, South St. Paul and Minneapolis, Minnesota. In November, 1934, he entered into the first large written contract with Swift & Co. for the transportation of its merchandise produced or used in its busi-[fol. 12]-ness and that of its ten or more subsidiaries and affiliates in the trade territory of the South St. Paul, Minnesota, plant of Swift & Co., which required him to operate between points and places in the States of Minnesota,

Wisconsin, Northern Iowa and Northern Illinois, and the Cities of Grand Forks and Fargo, North Dakota, on the Minnesota boundary line.

That Swift & Company was then and is now more than merely a "packing house" or "meat packing concern," irrespective of its popular designation as such. That company was then and still is a large producer, processor, manufacturer, distributor and merchandiser of a large list of commodities other than "*packing* house products," such as cheese, butter, oleomargarine, eggs, and dressed poultry, commonly called dairy products; canned goods, including canned foods other than meat, such as canned milk, fruits, vegetables and various condiments in cans, pails, bottles or jars; also cleaning compounds, glue, glycerin and glycerin compounds, anti-freeze, peanut butter, sandwich spreads, mayonnaise, salad dressing, soaps, ice cream, animal foods and other edible and inedible food, and other products including paper, wrappings, hardware and display material which go into the manufacture, processing, advertisement and distribution of these products and which cannot properly be classed as "*packing* house products" or as "*packing* house supplies."

(2) That on the 6th day of February, 1935, plaintiff entered into a similar contract with Libby, McNeill & Libby of Chicago, Illinois, and Blue Island, Illinois, for the transportation of its commodities produced or used in its business and that of its subsidiaries and affiliates between points and places anywhere in the same territory in which he carried on his operations for Swift & Company.

That Libby, McNeill & Libby was then and is now more than a "food cannery," irrespective of its popular designation as such. Its business requires not only the transportation of a great variety of canned goods and other finished products, but also all the commodities, goods, products, and materials, fresh, raw and packaged, that go [fol. 13] into the manufacture, processing and marketing of its canned goods, and other products, such as fruits, vegetables, groceries, condiments, spices, cans, glassware, jars, containers, waxes, paper, display material and numerous other articles and products, and supplies, materials and commodities utilized in the conduct and operation of its plants.

(3) That on the 1st day of June, 1935, plaintiff entered into a contract with Kraft Cheese Company, Chicago, Illinois, for the transportation of its merchandise produced or used in its business and that of its subsidiaries and affiliates between points and places anywhere in the same territory in which he carried on his operations for Swift & Company, including Chicago, Joliet, Freeport, Stockton, Milledgeville, Galena, Illinois, Albert Lea, Hutchinson, Rochester, Mankato and Duluth, Minnesota, and a great many points in Wisconsin, literally running into hundreds, but the principal ones being Milwaukee, La Crosse, Green Bay, Plymouth, Beaver Dam, Monroe, Wausau and Antigo, Wisconsin.

That Kraft Cheese Company was then and is now more than a cheese factory, irrespective of its popular designation as such, or of the implication in its corporate name. Although every class of cheese constitutes its largest volume of business, it produces and transports a large variety of canned goods, table sauces, salad dressings, sandwich spreads, mustard, horse radish, tartar sauce, oleomargarine, candies, malted milk food compounds, food seasoning compounds, lard substitutes, milk foods of various kinds, animal foods, advertising and display materials, and all the commodities, goods, products and materials which go into the manufacture, processing, advertisement and distribution of those products, both fresh and raw materials and packaged materials, and the operation and conduct of its factories, plants, offices, warehouses and equipment.

(4) That the said Trial Examiner C. J. Peterson did find that Swift & Company's territory of production, processing, manufacturing, sales and distribution was and is Minnesota, Wisconsin, Iowa, Northern Illinois above U. S. Highway 6, and Fargo and Grand Forks, North Dakota. The said Examiner did find also and the Record shows that the plaintiff had transported products and property of [fol. 14] Swift & Company, and its subsidiaries and affiliates, and of Libby, McNeill & Libby, from and to innumerable points within the said territory as directed by those concerns and over whatever highways and byways were convenient and accessible, and that there had been no fixed routes. The Record further discloses that the plaintiff has always been engaged in a balanced operation and that he never at any time contemplated or intended to

operate his motor vehicle empty, or in an economically unsound manner in any direction and when, prior to July 1, 1935, Swift & Company, or Libby, McNeill & Libby were unable to furnish return tonnage, the plaintiff transported general commodities under his common carrier certificate.

(5) That, under the provisions of Section 209 (b) of The Motor Carrier Act of 1935, amended, in 1940, as The Interstate Commerce Act, Part II, namely:

"That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

the plaintiff entered into approximately 120 contracts with shippers, 83 of which contracts are still existent, all of which are bona fide operations and are within the natural, normal and logical growth and scope of his "grandfather" territorial operations for Swift & Company, Libby McNeill & Libby, Kraft Cheese Company, and their subsidiaries and affiliates, and for shippers of the same or related articles or products; all of which bona fide operations were continuous operations extending over a period of years, were fully disclosed to and well known to the Commission, consented to by the Commission, and, in many instances, confirmed by the Commission in advising shippers that the plaintiff had the right to enter into contracts with shippers other than packing houses and food canneries.

(6) That plaintiff has, at large expense and investment, gradually increased his equipment and facilities for successful and serviceable operation until today he has acquired [fol. 15] and has in use in his operations 22 tractors, 22 trailers and 7 straight trucks, and has acquired and has in use considerable and valuable office equipment and well-equipped terminals and warehouses. He has engaged the services of many competent drivers and mechanics, having now approximately 80 full-time employees, and has transported in the past few years, and is transporting, approximately 100 million pounds a year within the territorial operation herein described. He was the first operator by motor vehicle to establish relay runs between the Twin

Cities and Chicago, and one of the first to install refrigerator service and other expensive equipment for the transportation of perishable goods. He has, since 1934, as an irregular carrier and within the scope of his territorial operations, transported general commodities, with certain exceptions, over regular routes between Chicago, Illinois, Milwaukee, Wisconsin, and St. Paul, So. St. Paul and Minneapolis, Minnesota.

(7) That the plaintiff, through large investments and his many years of service to the public, and his careful, efficient, satisfactory and successful manner in which he transported the freight of the shippers, has built up and developed his business as a carrier by motor vehicle to such an extent that the name of his business, to wit: "Noble Transit Company" is widely and favorably known in the entire territory in which he has operated and is operating. He has at all times carried cargo and other approved forms of insurance on his equipment. The Record shows that representative shippers deem the plaintiff's service necessary to their business and consider his operation thoroughly reliable and dependable.

XXIV

That the proof submitted to the Interstate Commerce Commission in support of the plaintiff's application for a permit or certificate to carry on his territorial operations clearly entitled and entitles the plaintiff to such permit, or certificate, under the provisions of, and proper interpretation of the words, language and terms of, the Motor Carrier Act of 1935, amended in 1940, as the Interstate Commerce Act, Part II, and Section 17 of Part I of the Act.

[fol. 16]

XXV

That, unless the Rulings and Order of the Commission, Division 5, made and filed on the 13th day of May, 1941, Plaintiff's Exhibit "A", herein, curtailing, restricting and limiting plaintiff's territorial operation to certain shippers, or class of shippers, certain commodities, and to certain points and places in the territory in which he has for many years been operating and is now operating, are suspended and set aside, and the Commission is enjoined from enforcing the same, plaintiff will suffer irreparable damage and irretrievable loss, his large investments in his business

will become valueless, his business will be very materially impaired and destroyed, more than 80 full-time employees will be deprived of their employment and livelihood, and the business of the shippers themselves, whom the plaintiff has served for many years and is now serving, will be materially disrupted and impaired.

XXVI

That, unless the Court shall by an interlocutory order enjoin and restrain the enforcement of said Rulings and Order of the Commission pending final determination of this action, plaintiff will in effect and for all practical purposes be denied the right to a judicial review of said Rulings and Order, since cessation of plaintiff's business for a single day would result in its irreparable impairment and destruction, and thus plaintiff's rights under the law would be denied him; and this Court should, to protect its jurisdiction herein, as well as plaintiff's right to judicial review of the Rulings and Order of the Commission, suspend said Rulings and Order pending final judgment herein.

Wherefore, plaintiff prays as follows:

(1) That notice and summons be issued herein to the defendants and served upon the United States of America and the Interstate Commerce Commission as required by law.

(2) That the Court issue and enter an interlocutory order herein suspending the Order of Division 5 of the Interstate Commerce Commission issued and entered on the 13th day of May, 1941, in plaintiff's proceedings before the Commission, and restraining the enforcement of said Rulings and Order pending final determination of this action.

[fol. 17] (3) That the action and proceedings before the Interstate Commerce Commission herebefore set forth and described, as well as the Rulings and Order of Division 5 of said Commission, be reviewed and considered by this Court; that, upon consideration thereof, said Rulings and Order be annulled and their enforcement prohibited and enjoined; that the errors of law in said Rulings and Order be corrected, and the Interstate Commerce Commission be directed to grant to plaintiff the permit, or certificate, to which the evidence and the proper interpretation of the law in said proceedings shows plaintiff to be entitled.

(4) That the Court make such other and further orders from time to time in the premises as the protection and enforcement of plaintiff's rights and of public shippers herein may require.

Charles A. Lethert, 650 Endicott Building, St. Paul, Minnesota. Frank H. Osterlind, 206 Hodgson Building, Minneapolis, Minnesota. Attorneys for Plaintiff.

[fol. 18] *Duly sworn to by John F. Noble. Jurat omitted in printing.*

[fol. 19] EXHIBIT "A" TO PETITION

Interstate Commerce Commission

No. MC—70830

John F. Noble Contract Carrier Application

Submitted March 16, 1940. Decided May 13, 1941

Applicant found entitled to continue operation as a contract carrier by motor vehicle, for stated classes of shippers of specified commodities, over irregular routes, between Grand Forks, N. Dak., and certain points in Minnesota, Wisconsin, and Illinois, by reason of having been engaged in such operations on July 1, 1935, and continuously since. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

George Patterson Boyle and *Frank H. Osterlind* for applicant.

Perry R. Moore, Clyde W. Fiddes, Edward C. Mattimore, Franklin J. Van Osdel, Franklin B. Overmyer, James B. Blanton, J. F. McGrath, T. A. Walsh, A. L. James, A. O. Bjorklund, T. J. Slattery, R. W. Cronon, and *J. E. Edell* for protestants.

Glenn W. Stephens for interveners.

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

Exceptions were filed by applicant to the recommended order of the examiner, and protestant motor carriers replied. Our conclusions differ somewhat from those recommended.

By application filed February 10, 1936, as amended, under the "grandfather" clauses of section 209(a) of the Interstate Commerce Act, John F. Noble, doing business as Noble Transit Company, of Minneapolis, Minn., seeks a permit as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with certain exceptions, between specified points and areas in the States of Minnesota, Wisconsin, Illinois, Iowa, and North Dakota, over regular and irregular routes. Certain rail and motor carriers oppose the application. W. C. Fullmer, doing busi- [fol. 20] ness as W. C. Fullmer Transfer, L. L. Hare, doing business as Hare Trucking Company, Olson Transportation Company, Yellow Truck Lines, Inc., and Volck Bros., Inc., were permitted to intervene subsequent to the hearing and service of the examiner's recommended order.

The Commission, division 5, by orders of December 27, 1939, and March 16, 1940, denied applicant's petitions for further hearing. By petition filed January 31, 1941, to which certain protestants replied, applicant alleges that he has filed certain new applications and again requests that the instant application be reopened and assigned for further hearing together with these new applications. As applicant has set forth no sufficient grounds for such further hearing and has not stated the nature and purpose of the evidence to be adduced at such further hearing, the petition is denied.

At the hearing, applicant described the area sought by this application to be all of Minnesota and Wisconsin, Fargo and Grand Forks, N. Dak., points in those portions of Illinois and Iowa lying north of U. S. Highway 20 from Sioux City to Independence, Iowa, thence Iowa Highway 11 to Cedar Rapids, Iowa, and thence U. S. Highway 30 to Chicago. Rights are claimed to serve Fargo and Grand Forks as destination points only. While applicant claims he is

entitled to continue serving the entire State of Wisconsin, he testified that on June 1, 1935, he did not operate in that State north of U. S. Highway 8, or west of U. S. Highway 53, extending from Superior, Wis., to La Crosse, Wis., or east of U. S. Highway 141, extending from Niagara to Milwaukee.

In November 1934, applicant commenced operating as a motor carrier with two trucks under a written contract with [fol. 21] Swift and Company, hereinafter called Swift, a meat-packing concern, from its plant at South St. Paul, Minn. This written contract between applicant and Swift provided, among other things, that applicant should receive from Swift or any of its subsidiaries, such quantities of their goods as may be tendered for transportation from time to time, but no points or territory were specifically named therein nor were the rates or quantities of traffic to be offered. The contract imposed no obligations on the shipper and in effect was little more than an agreement to permit deductions by the shipper for insurance carried. It was said to have been supplemented by oral contracts, but the nature of the latter is not disclosed. Under the agreement applicant's two trucks were placed at the exclusive disposal of Swift and its subsidiaries for use within its South St. Paul trade or shipping area and also out of its Chicago plant, and applicant hauled truckloads of "plant sales" under seal from the South St. Paul plant to Swift branch houses and to certain so-called break-bulk points, where the commodities were unloaded for subsequent local delivery or reshipment to consuming points by local truckers.

In February 1935, applicant commenced hauling canned goods under a written contract with Libby, McNeil & Libby, of Chicago, which is engaged in the canning of foods and operates a plant at Blue Island, Ill. This operation was performed in conjunction with the Swift operation and all routing and other directions pertaining to the Libby operation were given by Swift.

In February 1935, applicant attended a conference with Swift officials at which he was asked to extend his opera- [fol. 22] tions for Swift from the South St. Paul plant to include direct store-door deliveries to points formerly served by local carriers from the break-bulk points; that is, to provide a through trucking service of so-called "plant sales" direct to consuming points located on so-called "car-

routes". The institution of this service would require a specialized fleet of trucks more heavily insulated and equipped with meat rails and a certain type of floor construction for sanitary purposes. Applicant agreed to supply about six trucks constructed according to Swift's specifications and to undertake this new type of distribution. He rebuilt the two trucks already in use, acquired new trucks, one in March 1935, one in June, one in September, and one in December, and by March 1936, all of the trucks that applicant agreed to obtain were delivered. This new service to points beyond the break-bulk points was not commenced until October 16, 1935, and was thereafter extended to various routes as established by Swift. The last of these routes was instituted in August 1937.

On June 1, 1935, applicant entered into a written contract with the Kraft-Phoenix Cheese Corporation, hereinafter called Kraft, for the transportation of cheese and kindred food products, such as salad dressing, malted milk, and caramels, westbound out of Green Bay and Plymouth, Wis., and northbound out of Chicago and Freeport, Ill. Applicant, however, performed no actual operation for Kraft until March 1936, when he began to serve Minneapolis, St. Paul, and Green Bay, as this arrangement required a change in Kraft's method of distribution from Minneapolis and St. Paul. Still later applicant transported Kraft shipments to other points such as Rochester, Mankato, St. Cloud, and Duluth, Minn., Fargo and Grand Forks, and [fol. 23] Plymouth, Beaver Dam, Antigo, and Wausau, Wis. Mere intention, plans, preparation, or attempts to operate, even though bona fide, do not constitute operation within the meaning of that phrase in section 209(a) of the act, and having been instituted subsequent to the effective date of the act and being beyond the scope of applicant's "grandfather" rights as hereinafter found, the service rendered this shipper has constituted an unauthorized extension of operations.

Applicant's principal operations have consisted of rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul for delivery to Wisconsin points, following which the truck proceeds to Chicago or Blue Island to pick up loads at the plant of Swift or Libby, respectively, for delivery into Minnesota. Applicant submitted digests of shipments showing

his complete operations from November 17, 1934, to July 1, 1935, from July 1 to October 15, 1935, and, to show continuity of his operations, representative months of 1936, 1937, and 1938. In compiling the latter, applicant selected different months in each year, February, May, and September of 1936, January, June, and October of 1937, and January, April, July, and August of 1938. His testimony and that of the shippers corroborate these exhibits. The operations with respect to the commodities and the separate points of origin are discussed below.

South St. Paul: Prior to July 1 and through October 15, 1935, the operation was predominantly to Chicago and Milwaukee, to which there have been numerous shipments, but shipments were also transported to Grand Forks, N. Dak., Ottawa, Rockford, Aurora, and Waukegan, Ill., Hamp-
[Fol. 24] ton and Sioux City, Iowa, and 16 points in Wisconsin, namely, Hamburg, Antigo, Watertown, Beaver Dam, Janesville, Burlington, Kenosha, Wausau, Wisconsin Rapids, Madison, North Freedom, Baraboo, Marshfield, Racine, and Rhinelander. Between July 1 and October 15, 1935, the additional points of Algona, Mason City, and Dubuque, Iowa, and Forest Park, Ill., were served. Of the named Illinois points, only Chicago and Rockford were served with any degree of regularity; a single shipment was shown to Aurora prior to July 1, 1935, but only one thereafter, in August 1938; Waukegan was served during 1935 but not thereafter; and Ottawa was served but once in 1934, once in October 1937, and in April 1938. None of the Iowa points was served after 1935. While only one shipment to Grand Forks was shown prior to July 1, 1935, numerous shipments were transported regularly thereafter.

The 16 points in Wisconsin previously mentioned are located in a portion of the State described as follows: bounded on the east by Lake Michigan, on the south by the Wisconsin-Illinois State line, on the west by the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to LaCrosse, Wis., and by U. S. Highway 53 from LaCrosse to Cameron, Wis., and on the north by U. S. Highway 8. These points are widely scattered throughout the described area. Applicant admits that on the statutory date he did not operate in Wisconsin beyond this area. The so-called "car-route" operations which were instituted subsequent to October 15, 1935, include a net-work

of routes throughout this territory on which are located hundreds of points. The exhibits covering the period subsequent to October 15, 1935, show numerous and regular ship-
[fol. 25] ments to "points on car route" and to specific points, among which are most of the 16 original points; the remainder of those original points are located on the car-routes.

Chicago: Applicant's traffic from Chicago has been primarily to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis., and shipments have moved to those points frequently and with regularity since prior to July 1, 1935. The digests also contain shipments to nine other points in Minnesota, but these moved only to the Swift freight dock at South St. Paul. Applicant suggests that these shipments might thereafter have been hauled to the destination as part of a load for intrastate distribution, but concedes he has no evidence to show that they did move beyond South St. Paul. A few shipments were made to a limited number of other points. For example, one shipment is shown to Red Wing, Minn., prior to July 1, 1935, one other in 1935, and thereafter only one shipment each was made in 1937 and 1938; one shipment was transported to Minnesota Transfer, Minn., prior to July 1, 1935, one in 1935 thereafter, one in 1936, and one in 1938; and shipments are shown to Montevideo, Minn., prior to July 1, 1935, and through February 1936, but only two were made thereafter, one in September 1936 and the other in 1938. Single shipments were transported to five points in Wisconsin in 1935 but no shipments are shown to those points thereafter. Mason City, Iowa, was served prior to July 1, 1935, and again in 1936, but not thereafter. During the so-called interim period six other points in Minnesota and one in Iowa were served but no shipments were transported to those points after 1936.

[fol. 26] *Blue Island:* Prior to July 1, 1935, applicant transported shipments of canned foods from Blue Island to five points in Wisconsin and five points in Minnesota. Of these, four of the Minnesota points, St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, have been served continuously since, but none of the others was served after 1935, except that a single shipment was transported to La Crosse, Wis., in September 1936. During the "interim" period shipments were transported to two Minnesota and

two Wisconsin points in addition to those mentioned above, but no subsequent shipments were shown except one in 1937 to Austin, Minn.

Detroit Lakes: A single shipment was transported to Milwaukee from Detroit Lakes between July 1 and October 15, 1935, but no further shipments moved to that point. All remaining shipments moved to Chicago, but there is conflicting evidence with respect to service rendered. Applicant testified that poultry and produce move from Detroit Lakes seasonally in October, November, and December and that as he was not in business in those months of 1934, he did not commence such operation until after October 15, 1935. However, the exhibits list one shipment on June 24, 1935, of butter, poultry, and eggs; thereafter there were shipments of produce in February 1936, butter and poultry in May 1936, butter and produce in January 1937, butter and cheese in June 1937, butter in October 1937, and produce and butter in January 1938. No shipments whatever are shown in the remaining representative months in 1938. In other words, as to the two commodities named by applicant as constituting the traffic originating at this point, poultry was transported only in June 1935, January 1937, and January 1938, and produce only in February 1936, January [fol. 27] 1937, and January 1938; and in October 1937, the only month on the exhibit falling within the season specified by applicant, the only commodity transported was butter. Likewise, as to the commodities comprising the shipment of June 1935, eggs were not thereafter handled and butter was not transported for nearly a year thereafter or until May 1936, although other shipments moved after the latter date.

Other points of origin: Shipments have also been transported by applicant prior to October 15, 1935, which originated at Sioux City and Mason City, Iowa, Milwaukee, Beaver Dam, Marshfield, Manitowoc, and De Pere, Wis., Aurora and Rockford, Ill., and Minneapolis. However, only single shipments were transported from a majority of these points, and in any event none was served after 1937. Between July 1 and October 15, 1935, applicant transported a shipment from Green Bay, Wis., to South St. Paul, but no service was subsequently performed to that destination. Since October 15, 1935, applicant has hauled shipments from

a number of points not previously served but the only ones as to which there has been any appreciable volume of traffic have been from Green Bay to Minneapolis, from Plymouth, Wis., to Albert Lea and Minneapolis, and Eau Claire to St. Paul, Minnesota Transfer, and Minneapolis.

Commodities: Shipments from Blue Island have consisted only of canned foods. However, from Chicago and South St. Paul the shipments have consisted of canned goods, meats, various packing-house products, dairy products, and innumerable supplies used in conjunction with the manufacture or distribution of those products. In some instances, shipments on the digests are listed as [fol. 28] "general commodities" and these were shown to have consisted of such widely diversified commodities as empty hogsheads, broken glass, hoops, veal fronts, thermometers, pistachio nuts, chunks, poultry, meat, trisodium, soap, toilet paper, bolts, files, pail covers, and paper; numerous other articles have been transported, including castings, corks, mail tubes, oranges, gate locks, stationery, tag fasteners, extension lights, signs, ammonia, skewers, asphalt, rope, paint, tires, glue, pig lead, overalls, rags, yarn, hooks, meal, cartons, and many others. All traffic handled by applicant prior to the statutory date and until October 15, 1935, was transported for Libby or for Swift or one of its subsidiaries. Likewise, all of his equipment has refrigerator bodies.

Discussion and conclusions: The above facts outline applicant's operations as of July 1, 1935, which were performed for Swift and Libby. While a few additional points were served between that date and October 15, 1935, it is seen that because of a lack of sufficient continuity of those operations, no definite "interim" operations have been established. Subsequent to October 15, 1935, applicant extended his operations, such as that performed for Kraft, without authority to do so. He now contends that should we hold that the extension of his service to additional points constitutes an unauthorized extension of operations, it is incumbent upon us in the present proceeding to receive testimony offered by him to prove that such extension was and is consistent with the public interest and the national transportation policy. He sought to introduce testimony on the question of consistency with the public interest or pub-

lic convenience and necessity, but upon objection by protestants, such testimony was not received by the examiner. [fol. 29] Applicant argues that section 209 (a) of the act contains not only the "grandfather" clause, but also the law regulating the procedure for carriers who do not come within the "grandfather" provision, and points out that this section reads in part as follows:

> Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly.

Applicant contends that if we should find that he was not in bona fide operation within the territory claimed, then we must be governed by the language above quoted and decide the application in accordance with section 209 (b). A similar contention was considered and overruled by the Commission in *Fisher Common Carrier Application*, 17 M. C. C. 565, and 20 M. C. C. 561. A like conclusion is warranted in the instant case.

The remaining questions presented are (1) as to the manner in which the service applicant should be authorized to perform should be described, and (2) the physical scope of the operations to be authorized. These questions will be discussed separately.

While applicant has transported a wide range of commodities, the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products and supplies in the manner hereinbefore described. The question of the form of authority to be granted to contract carriers of retail food store commodities was considered at length in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 476, and the same problem with respect to defining the business of applicant [fol. 30] and scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications.

With respect to the physical scope, applicant contends that he is entitled to authority to operate between all points included in the application. However, the record does not support this contention. Except with respect to the Wis-

consin area served from South St. Paul hereinafter discussed, applicant's operations have been essentially between specific points, with large volumes of traffic moving between those points. As previously stated, applicant served 16 points which are scattered throughout the described area in Wisconsin, and has served those and surrounding points in the territory continuously since, and in our opinion applicant was operating to that territory on July 1, 1935, and is entitled to authority to continue such operation. As to the remaining operations, the recited facts do not indicate that applicant was serving points generally in the territory but rather that he has made occasional or sporadic shipments to or from points not subsequently served. Likewise the service from Detroit Lakes as shown herein is not sufficient to warrant the granting of any authority. We therefore conclude that applicant on the statutory date was in bona fide operation only to the extent described in our findings herein.

Findings: We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods [fol. 31] from Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packinghouse products and supplies, from South St. Paul, to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied.

Upon compliance by applicant with the requirements of sections 215 and 218 of the act, with our rules and regulations thereunder, and with the requirements established in

Contracts of Contract Carriers, 1 M. C. C. 628, an appropriate permit will be issued. An order will be entered denying the application, except to the extent a permit is granted herein.

LEE, *Commissioner*, concurring:

In my opinion the facts of record show that applicant is entitled to a permit authorizing transportation (1) of canned goods, fresh meats, dairy products, packing-house products and supplies (a) from South St. Paul, Minn., to Grand Forks, N. Dak., to all points in the Wisconsin territory described above, and to all points in Illinois on and north of U. S. Highway 30; and (b) from the commercial zone of Chicago, as defined in Chicago, Ill., *Commercial Zone*, 1 M. C. C. 673, to La Crosse, Wis., Fargo, N. Dak., and all points in Minnesota; and (2) butter, eggs, and poultry from Detroit Lakes, Minn., to the commercial zone of Chicago.

[fol. 32] ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 13th day of May, A. D. 1941

No. MC-70830

JOHN F. NOBLE CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, including applicant's petition for further hearing filed January 31, 1941, and said division on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied effective July 14, 1941.

And it is further ordered, That the said petition of applicant for further hearing filed January 31, 1941, be, and it is hereby, denied.

By the Commission, division 5

W. P. Bartel, Secretary. (Seal)

[fol. 33] EXHIBIT "B" TO PETITION

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of October, A. D. 1941

No. MC 70830

JOHN F. NOBLE CONTRACT CARRIER APPLICATION

Minneapolis, Minnesota

Upon consideration of the record in the above-entitled matter, of applicant's petition for reconsideration thereof; and good cause appearing:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal)

[fol. 34] EXHIBIT "C" TO PETITION

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC 70830

JOHN F. NOBLE CONTRACT CARRIER APPLICATION

Minneapolis, Minnesota

Present: William E. Lee, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record; and good cause appearing:

It is ordered, That the order of the Commission entered herein on May 13, 1941, which by its terms, as thereafter modified, denies a portion of the application, effective September 2, 1941, be, and it is hereby, further modified to the extent that such denial order is to become effective November 12, 1941.

Dated at Washington, D. C., this 26th day of August, A. D. 1941.

By the Commission, Commissioner Lee.

W. P. Bartel, Secretary. (Seal)

[fol. 35] In District Court of the United States, District of Minnesota, Third Division

[Title omitted]

Order for Hearing—November 8, 1941

A verified position by the plaintiff having been filed herein for an Order suspending the enforcement and setting aside of the rulings and Order made by the defendant Interstate Commerce Commission, and directing the said Commission to grant plaintiff the permit, or the certificate, to which the record and the proper interpretation of the law in plaintiff's proceedings before the Commission shows plaintiff to be entitled:

It Is Hereby Ordered that said petition shall be heard on the 16 day of Jan., 1942, at 10 o'clock A. M., before Circuit Judge John E. Sanborn and District Judges Robert C. Bell and George F. Sullivan.

It Is Further Ordered that this Order and the Petition be served on the United States of America and the Interstate Commerce Commission by filing a copy thereof and a copy of the Petition with the Secretary of the Interstate Commerce Commission and the Department of Justice, and by serving a copy of this Order and the Petition upon W. E. Hustleby, District Director of the Interstate Commerce Commission.

It Is Further Ordered that unless the Interstate Commerce Commission grants a further stay of the effective [fol. 36] date of said Denial Order of May 13, 1941, Plaintiff's Exhibit "A", pendente lite, that defendants show cause on Wednesday, November 12, 1941, before this Honorable Court at 10 o'clock in the forenoon, in the Federal Court Building, St. Paul, Minnesota, why a temporary restraining order should not issue forthwith staying and suspending the enforcement of said Denial Order of May 13, 1941.

Dated this 8th day of November, 1941.

Robert C. Bell, United States District Judge.

[fol. 37] [File endorsement omitted.]

[fol. 38] IN DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MINNESOTA

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed December 29, 1941

The defendant, United States of America:

1. Admits the allegations of paragraph I except the allegation that this action arises under the Fifth Amendment to the Constitution; those of paragraph XI; and those of paragraph XII.

2. Admits those allegations of paragraphs III, VI, VII, VIII, IX and X which are in accord with the statement of the proceedings quoted in the Report of the Interstate Commerce Commission dated May 13, 1941, attached as Exhibit A to the complaint herein; and denies those inconsistent therewith.

3. Admits those allegations of paragraphs II, IV, XXIII and XXIV which are in accord with the Findings of Fact contained in the aforesaid Report of the Interstate Commerce Commission; and denies those inconsistent therewith.

4. Denies the allegations of paragraphs V, XIII, XIV, [fol. 39] XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXV and XXVI, and those of all other paragraphs not herein specifically answered.

Wherefore, the defendant United States of America prays that the complaint be dismissed.

Joseph E. McDowell, Special Attorney. Thurman Arnold, Assistant Attorney General. Victor E. Anderson, United States Attorney.

[fol. 40] I certify that a copy of the foregoing answer of the United States was this day mailed to the following persons:

Charles A. Lethert, Esq., 650 Endicott Building, St. Paul, Minnesota; Frank H. Osterlind, Esq., 206 Hodgson Building, Minneapolis, Minnesota, Attorneys for Plaintiff. Allen Crenshaw, Esq., Interstate Commerce Commission, Washington,

D. C., Attorney for Interstate Commerce Commission. C. D. Todd, Jr., Esq., 1424 16th St., N. W., Washington, D. C., Attorney for Intervenor, Contract Carrier Division, American Trucking Associations, Inc. Joseph E. McDowell, Special Attorney.

December 23, 1941.

[fol. 41] [File endorsement omitted.]

[fol. 42] In District Court of the United States, District of Minnesota

[Title omitted]

Answer of Interstate Commerce Commission—Filed December 8, 1941

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's petition contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraph I of the complaint, the Commission admits that the court has jurisdiction of the cause of action herein.

II

Answering the allegations of paragraph II of the complaint, the Commission admits that the plaintiff resides in [fol. 43] the jurisdictional district of Minnesota and is engaged in the business of an interstate motor carrier under the name of Noble Transit Company and as authorized by the Commission under the report and order entered May 13, 1941, attached to the complaint as Exhibit A.

III

Answering the allegations contained in the remaining paragraphs of the complaint, the Commission alleges that proceedings were instituted before the Commission upon

the filing of the application by John F. Noble on February 10, 1936, seeking a permit as a contract carrier or in the alternative a certificate as a common carrier under the "grandfather" provisions of Sections 209 (a) or 206 (a), the said application being given and thereafter considered under Docket No. MC-70830; that in said proceedings the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon matters covered in and by the report and orders of the Commission, hereinafter referred to and identified, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein by its counsel; that in said hearings and subsequently in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said plaintiff by its counsel, including many of the questions raised by the plaintiff in this action; that thereafter on May 13, 1941, the Commission issued and entered its report and order in said proceedings, the same being attached hereto and made a part of this answer, being marked [fol. 44] as Exhibits A and B, respectively; and that thereafter the effective date of said order was by amended orders extended from September 2, 1941, to January 16, 1942; and that the plaintiff's petition for reconsideration was denied at a general session of the Commission on October 6, 1941.

The Commission further alleges that the findings and conclusions in said report and order were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid, and that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel.

The Commission further alleges that the said report and order of May 13, 1941, were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the petition.

IV

Specifically answering the allegations contained in paragraph VII of the complaint, the Commission avers that it is unable to determine from the general allegations what testimony was excluded and which is claimed to be relevant and competent, and for such reason is unable to answer more particularly, but specifically denies that relevant and competent testimony was excluded and not considered by the Commission.

[fols. 45-56]

V

Specifically answering the allegations of paragraph XXI of the complaint, the Commission alleges that the report and order of May 13, 1941, was the official act made and entered by Division 5 of the Commission, was made in accordance with the provisions of law and regulation of the Commission, and it is denied that the said report and order was made or entered by an examiner, attorney, official or other person.

VI

Specifically answering the allegations of paragraph XXIII of the complaint, the Commission avers that court review of this action is limited to such facts as were offered by the plaintiff and presented to the Commission and which now constitute a part of the Commission records, for which reason allegations of fact not a part of the Commission record are not here admissible or relevant.

VII

Specifically answering the allegations of paragraphs XXV and XXVI of the complaint, the Commission denies that the plaintiff will suffer irreparable damages by reason of its report and order.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, By Allen Crenshaw, Attorney. Daniel W. Knowlton, Chief Counsel, Of counsel.

[fol. 57-59] *Duly sworn to by Wm. E. Lee; jurat omitted in printing.*

[fol. 60] PLAINTIFF'S EXHIBIT "B"

IN UNITED STATES DISTRICT COURT

Before the Interstate Commerce Commission

Docket No. MC 70830

Form BMC 1

In the matter of

The application of JOHN F. NOBLE, individual, doing business as Noble Transit Company of 710 Washington Avenue, Southeast, Minneapolis, Minnesota, for a certificate of public convenience and necessity or permit (Form BMC 1) authorizing operation as a common or contract carrier by motor vehicle in the transportation of commodities generally, in interstate commerce between points located in the states of Minnesota, Illinois, Wisconsin, Iowa, and North Dakota over regular and irregular routes

St. Paul, Minnesota, September 21, 1938. 9 o'clock a. m.

Before: C. J. Peterson, Examiner

Met pursuant to Notice

APPEARANCES:

George Patterson Boyle, 10 South LaSalle Street, Chicago, Illinois, appearing for applicant.

Clyde W. Fiddes and Perry R. Moore, 1100 First National Soo Line Building, Minneapolis, Minnesota, appearing for Raymond Bros. Motor Transportation, Inc., St. Cloud, Minnesota; Steller Transportation Company, Minneapolis, Minnesota, and Witte Transpartation Company, St. Paul, Minnesota.

[fols. 61-62] Edward C. Mattimore, 809 Commerce Building, St. Paul, Minnesota, appearing for Glendenning Transfer Service.

Franklin J. Van Osdel, 506 First National Bank Building, Fargo, North Dakota, appearing for Elsholtz Tri-City Lines, Inc., Fargo, North Dakota.

Franklin R. Overmyer and James B. Blanton, 111 West Monroe Street, Chicago, Illinois, appearing for Illinois-Minnesota Motor Carriers Conference.

P. A. Walsh, Northern Pacific Railway Building, St. Paul, Minnesota, appearing for Northern Pacific Railway Company.

J. F. McGrath, 417 North 3rd Street, LaCrosse, Wisconsin, appearing for Gateway City Transfer Company, Inc., LaCrosse, Wisconsin.

A. L. Janes, Great Northern Building, St. Paul, Minnesota.

A. O. Bjorklund, Soo Line Building, Minneapolis, Minnesota, and

T. J. Slattery, appearing for Great Northern Railway Company, Minneapolis, St. Paul & Sault Ste Marie Railway Company, and all other interested rail carriers.

J. E. Edell, 3rd and Cass Streets, LaCrosse, Wisconsin, appearing for Service Transfer & Storage Company.

[fol. 63] COLLOQUY

Exam. Peterson: The Interstate Commerce Commission has set for hearing at this time and place, Docket No. MC 70830, in the matter of the application of John F. Noble, individual, doing business as Noble Transit Company of 710 Washington avenue, Southeast, Minneapolis, Minnesota, for a certificate of public convenience and necessity or permit, Form BMC 1, authorizing operation as a common contract carrier by motor vehicle in the transportation of commoditjes generally, in interstate commerce, between points located in the states of Minnesota, Illinois, Wisconsin, Iowa, and North Dakota, over regular and irregular routes. This application has been sef before Examiner C. J. Peterson. Who appears for applicant?

Mr. Boyle: George Patterson Boyle for the applicant, 10 South LaSalle Street, Chicago, Illinois. I am a practitioner.

Mr. Fiddes: Clyde W. Fiddes and Perry R. Moore, 1100 First National Soo Line Building, Minneapolis, Minnesota, appearing for Raymond Bros. Motor Transportation, Incorporated, St. Cloud, Minnesota; Steller Transportation Company, Minneapolis, Minnesota; and Witte Transportation Company, St. Paul, Minnesota, in opposition to the application. I am a practitioner before the Commission. The interest of our clients in this case is that they operate as common carriers by motor vehicle within the territory and over the routes involved in the application pending [fol. 64] today, and will be affected adversely by the operation proposed.

Mr. Moore: I am also a practitioner before the Interstate Commerce Commission.

Mr. Mattimore: Edward C. Mattimore, 809 Commerce Building, St. Paul, Minnesota, appearing for the Glendenning Transfer Service. I am permitted to practice before the Commission.

Mr. Van Osdel: Franklin J. Van Osdel, 506 First National Bank Building, Fargo, North Dakota, admitted to practice. I appear for the Elsholtz Tri-City Lines, Incorporated, Fargo, North Dakota, in protest.

Mr. Overmyer: If the Examiner please, Franklin R. Overmyer, attorney and practitioner, 111 West Monroe Street, Chicago, Illinois, and James B. Blanton, who is a practitioner, 8 North Ogden Avenue, Chicago, appearing for the Illinois-Minnesota Motor Carriers Conference, protestants, operating into the territory in which this applicant operates.

Exam. Peterson: You have been admitted to practice?

Mr. Blanton: Yes.

Mr. Boyle: Have we a list of the members of this Minnesota-Illinois Conference?

Mr. Overmyer: I can read such a list into the record. I will put it on the blank.

Mr. Boyle: I would just like to see it.

Mr. Overmyer: I will show you who they are.

Exam. Peterson: Your appearance is in both cases?

[fol. 65] Mr. Overmyer: That is correct.

Mr. McGrath: J. F. McGrath, representing the Gateway City Transfer Company, Inc., LaCrosse, Wisconsin.

Exam. Peterson: You are an official of the Gateway City?

Mr. McGrath: I am; yes, sir.

Exam. Peterson: The reason for your appearance?

Mr. McGrath: We traverse the same territory as the applicant.

Mr. Van Osdel: Mr. Examiner, would it be all right if I state our reasons for our appearance?

Exam. Peterson: Yes.

Mr. Van Osdel: Mr. Reporter, I should like to attach to my appearance that I am appearing for protestants in these cases on behalf of Elsholtz Tri-City Lines, Incorporated, because it appears from the claims of the application that they are asking for grandfather rights over the same territories and routes as are now being served by the protestant

that I represent, the Elsholtz Tri-City Lines, Incorporated, Fargo, North Dakota.

Exam. Peterson: Mr. Mattimore.

Mr. Mattimore: I think that is all.

Exam. Peterson: Did you state on the record the reason for your appearance?

Mr. Mattimore: Yes.

Mr. Walsh: P. A. Walsh, Northern Pacific Railway [fol. 66] Building, St. Paul, Minnesota, appearing for Northern Pacific Railway Company.

Mr. Janes: A. L. Janes, Great Northern Railway Building, St. Paul, Minnesota, attorney for Great Northern Railway Company, and Mr. A. O. Bjorklund, attorney, Soo Line, Minneapolis, both attorneys and practitioners, appearing on behalf of the Great Northern Railway; Minneapolis, St. Paul & Sault Ste Marie Railway, and other interested rail carriers. We are both attorneys and practitioners. And Mr. T. J. Slattery, St. Paul, Minnesota.

Mr. Edell: J. E. Edell, Third and Cass Streets, LaCrosse, Wisconsin, appearing for Service Transfer & Storage Company. I am admitted to practice.

Mr. Boyle: Mr. Examiner, I move that direct reference be made in the transcript of this case to the proceedings in Docket MC 70831.

Exam. Peterson: Have you any objection?

(No response.)

Exam. Peterson: Reference will be so made.

Mr. Boyle: Mr. Examiner, in order to expedite, if possible, the hearing, I would like to know just exactly what is comprising part of the official record. I assume that the application has been filed and is in the nature of an exhibit, and therefore a part of the record.

[fol. 67] Exam. Peterson: Except for a statement of facts in the application relied upon.

Mr. Boyle: Well, the statement of facts in the application is in response to the particular questions. They are usually quite general. It asks for typical things. Naturally we would not want to be restricted by the application. We propose to make that very much more complete.

Exam. Peterson: That is right, if there are any facts.

Mr. Boyle: But that application so far as the conditions which is filed, it is all a matter of record.

Exam. Peterson: Yes.

Mr. Boyle: There was also furnished to the Commission in connection with the application certified copies of the licenses or permits granted to this petitioner by the several states through which he operated. That was in accordance with the Commission's requirements, and they are a part of your file. If they are not an official part of the record, I should like to have them considered as a part of the record.

Mr. Moore: We would like to have copies, too.

Mr. Boyle: I see no reason. They are there for inspection. We might withdraw it and have the stenographer make copies. They are there ready for inspection, and the license that is issued, certified by the Commission. We did not get the Commission to certify a number of copies of it.

Mr. Moore: I do not quarrel with that, but we have got to have something to go on. This original docket will prob- [fol. 68] ably be in Washington. For that reason I am inclined to insist upon copies being furnished at some time or other during the progress of the hearing.

Mr. Boyle: We have no objection to giving them a typewritten copy.

Mr. Moore: That is sufficient.

Exam. Peterson: Do you have the copy here, carbon copy of these certificates?

Mr. Boyle: Yes, sir. I am quite sure we have.

Exam. Peterson: Right here?

Mr. Boyle: If I find during the day we have not all of them, I will get permission to file the Commission's copy and have the stenographer run off copies.

Mr. Moore: We regard these state certificates of some importance here.

Mr. Boyle: I would not ask to make them a part of the record if I did not think likewise.

Mr. Moore: I would like to have a copy of them, as long as it is reasonable for us to have it. If you have copies in your file, Mr. Boyle, couldn't you have a stenographer run them off now? I would like to have them for cross examination.

Exam. Peterson: You might look through the docket here and see which ones you propose to rely on. Then see if you have carbon copies. Then you can have the stenographer [fol. 69] make copies.

Mr. Boyle: I think I have enough copies, but if I can't get the typewritten copies here early enough, I think Mr.

Moore would be able to cross examine from the Commission's file.

Mr. Moore: We will have them here by noon?

Mr. Boyle: You will have either the original copy of the docket, or the certificate, in time for your cross examination.

Mr. Moore: Of course, the original is always available.

Mr. Boyle: I just want to make sure it is part of the record.

Mr. Moore: Then it becomes a part of the record.

Exam. Peterson: You have asked to have it specifically made a part of the record, when you get to it?

Mr. Boyle: I am asking now.

Exam. Peterson: The application itself?

Mr. Boyle: The application is a part of the record, that was sent in in support of the application.

Exam. Peterson: The certificates will not be considered as a part of the record at the present time, just the application. At this time the certificates or any statement of facts in the application will not be considered a part of the record until it is asked to be made a part of the record by reference.

Mr. Boyle: I am asking now to have the certificate made [fol. 70] a part of the record. I happen to have one right here.

Exam. Peterson: Name them.

Mr. Van Osdel: It is my understanding, Mr. Examiner, that when these cases are ready for disposition formally, then, so to speak, we start from scratch. The application that is left in the file is the original application, and all documentary matters that are tending to prove this applicant's grandfather rights should be in the form of exhibits. I think for convenience of protestants, that before we proceed here, at this early stage of the hearing we should have copies. Then we will go on. Copies will be given to us later in the day?

Mr. Boyle: I ask, Mr. Examiner, to have made a part and considered a part of the record, the certificate of license issued by the State of Minnesota under date of January 14th, 1935, to John F. Noble, as a contract carrier, that certificate being signed by Mr. W. E. Hustleby.

Exam. Peterson: Secretary of the Minnesota Commission. Here is the exhibit number given in the application, B-1-A. You don't have that?

Mr. Boyle: I don't have that.

Exam. Peterson: I think you better take the original application and go through that, and state what you are relying on.

Mr. Boyle: Yes, B-1-A.

Mr. Van Osdel: Of the *application*?

[fol. 71] Mr. Boyle: Yes.

Mr. Moore: Mr. Peterson, will that bear this number in this record?

Exam. Peterson: By reference. It will not be marked an exhibit number.

Mr. Boyle: This was a part of the application submitted to the Commission. These are the data that they called for.

Exam. Peterson: Yes.

Mr. Moore: I understand.

Mr. Boyle: Upon the application.

Mr. Moore: We are here making a formal record, Mr. Boyle. They ought to have some method of record.

Mr. Boyle: That is what I propose to do.

Exam. Peterson: What is the next one?

Mr. Boyle: That is the certification.

Exam. Peterson: Yes?

Mr. Boyle: It is part of the same. Likewise, a certificate from the Public Service Commission, November 24th, 1934, license number I. C. 434, which is a part of the same appendix.

Exam. Peterson: B-1-A.

Mr. Boyle: B-1-A.

Exam. Boyle: Is that the same number, the correct number?

Mr. Boyle: That is the correct number, 70830. I will have copies made of this.

Exam. Peterson: Those are all the certificates involved?

[fol. 72] Mr. Boyle: I think so. If there be others, they will be timely introduced. Mr. Examiner, is there any way of referring to the Minnesota certificate and Wisconsin certificate? They both seem to be a part of Exhibit B-1-A. Shall we refer to them as Minnesota B-1-A and Wisconsin B-1-A?

Exam. Peterson: I think that will be all right.

Mr. Boyle: We might simplify it by giving the Minnesota certificate Exhibit No. 1 and Wisconsin, Exhibit No. 2.

Mr. Van Osdel: That is right, Examiner Peterson. Then have copies made and put it in the record.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.
Mr. Boyle: I will call Mr. Noble.

JOHN F. NOBLE was sworn and testified as follows:

Direct examination.

By Mr. Boyle:

Q. Give your name and address to the reporter, please.
A. John F. Noble, 710 Washington Avenue, Southeast, Minneapolis, Minnesota.
Q. You are engaged in the trucking business, Mr. Noble?
A. I am.
Q. Just state the name of the company?
A. We operate as the Noble Transit Company.
[fol. 73] Q. Is that a corporation or individual?
A. Individual.
Q. Now, Mr. Noble, will you state when you began your operation and where your headquarters were?
A. We began our operation as a contract carrier in November, 1934, with headquarters at 710 Washington avenue, Minneapolis, Minnesota.
Q. What was the nature of the business you engaged in as a contract carrier or as a motor carrier at that time?
A. At that time we entered in the field of contract carrier working for Swift & Company.
Q. Are Swift & Company packers?
A. They are.
Q. Did you have a contract with Swift?
A. I did.
Q. Has a copy of that contract been furnished to the Commission?
A. It has.
Q. Now, that was in November, 1934?
A. Yes, sir.
Q. Will you briefly outline the nature of the operation at that time?
A. At the time we entered into the contract with Swift & Company we agreed to place our trucks at their disposa

for them to use at any place in the territory that they saw fit to send.

[fol. 74] Q. What do you mean by territory?

A. Their shipping territory out of South St. Paul that is used by trucks.

Q. At that time was there any agreement as to shipments out of Chicago?

A. There was. The agreement out of Chicago,—the agreement to move Swift's commodities and Swift's subsidiaries' commodities exclusively out of Chicago.

Q. Any other origin points at that time?

A. Well, the general character of the business was that Swift & Company at South St. Paul would furnish a load in one direction, usually tying it up with a load coming from some point fairly adjacent to the point that you were sent to as a return load.

Q. According to your personal knowledge, Swift & Company has operations at various points in the State of Wisconsin and Iowa?

A. They have.

Q. Illinois?

A. They have.

Q. Minnesota?

A. They have, yes, sir.

Q. They operate a packing plant in South St. Paul, do they not?

A. They do.

Q. Now, will you tell us a little more about the character [fol. 75] of the agreement that you had with Swift & Company?

Mr. Mattimore: Just a minute, Mr. Boyle. Do you have a copy of the contract?

Mr. Boyle: Yes.

Mr. Mattimore: I object to this testimony on the ground it is not the best evidence. The contract will speak for itself.

Mr. Boyle: The contract of the contract carrier may be either oral or written.

Mr. Mattimore: He said it was written and on file.

Mr. Boyle: There may be oral agreements that may not broaden the contract. We have no objection, your Honor, to the gentleman seeing the copy of the contract.

Exam. Peterson: Are you going to furnish them?

Mr. Boyle: I will give it to him right now.

Exam. Peterson: Make it an exhibit?

Mr. Boyle: No, sir, I think not.

Exam. Peterson: Why not?

Mr. Boyle: We already have it of record.

Exam. Peterson: Where?

Mr. Boyle: It has been furnished to the Commission.

Exam. Peterson: I know it. It seems to me you should have a copy at least.

Mr. Boyle: We can do that. We can give you that. Of course, current contracts are all on file, but the particular [fol. 76] contract is of 1934. Why, I have it right here, and I should be very glad to let counsel examine it.

Mr. Mattimore: We have copies, do we?

Mr. Boyle: No.

Mr. Mattimore: If the Examiner please, I wonder if I could hear the question that was last put to the witness, please?

(The question was read.)

Mr. Mattimore: That question is objected to on the ground that if it is a written contract, this evidence is not the best evidence. We would like to have the contract in evidence.

Mr. Boyle: I find I have several copies here. I am rather agreeably surprised to make that statement.

Mr. Mattimore: Those documents in your hand, I assume, are the contracts.

Mr. Boyle: Maybe. It reads contract carrier trucking contract. You may look at it. Then maybe I can reframe the question. I have received permission from Swift & Company to furnish those two copies of this and to make a physical offer of another for the record. Without that permission I would not be able to do it, of course. And I have permission of Swift & Company, as far as this contract is concerned, to furnish a couple of copies and to offer this one for the record.

Mr. Van Osdel: He says a couple of copies. Are we going to be furnished copies?

Mr. Boyle: Yes. These fellows all know that contract by [fol. 77] heart, Mr. Examiner.

Exam. Peterson: Pass the couple of them around.

Mr. Fiddes: It is going to be marked as an exhibit, something or other.

Exam. Peterson: Have it marked Exhibit No. 1.

Mr. Mattimore: I think, if the Examiner please, right at this time it ought to be understood with any of these exhibits we are entitled to copies of them.

Exam. Peterson: Yes.

Mr. Boyle: They will get copies of the exhibit.

Mr. Mattimore: We are entitled to them at the time they are offered.

Exam. Peterson: You will submit them today some time?

Mr. Boyle: Yes. I am getting them out. I think if they want to be at all reasonable, those three copies I have given are plenty for all of them.

Exam. Peterson: I think if you furnish certified copies later on and then pass these around, some of them——

Mr. Boyle: I don't see any need of a certified copy. I have the original right here. I propose to have Mr. Noble identify the copy and file this. It is identical to the ones I have given them over there.

Exam. Peterson: Protestants can get together and agree on this. Let us proceed.

Mr. Boyle: If they won't give us time, all right. If [fol. 78] they want to give us time to get to a typewriter and have that run over, we will do it.

Exam. Peterson: I think they want that.

Mr. Boyle: Yes, they know what this is better than I do.

Exam. Peterson: They can't rely on their memory.

By Mr. Boyle:

Q. Mr. Noble, I hand you a document purporting to be a copy of a contract entered into with Swift & Company, dated November 1, 1934, and ask you if that is a true and correct copy of the agreement that existed then?

A. It is.

Exam. Peterson: Has that been marked?

Mr. Boyle: Not yet. Mark it with a number, Mr. Reporter.

(Applicant's Exhibit 1 identified.)

By Mr. Boyle:

Q. We were about to discuss some of the operations of November, 1934——

Mr. Mattimore: Has the exhibit been offered and received in evidence?

Mr. Boyle: No. It has only been identified.

Exam. Peterson: Proceed.

Mr. Boyle: I think it is probably better to follow the usual procedure when they are all identified, to take the entire exhibits.

Mr. Moore: I don't think it is better at all. In the meantime both of us might have forgotten what identification there was. I shall insist they be introduced and offered [fol. 79] as identified.

Mr. Boyle: I think the gentleman may suggest, but the Examiner may insist.

Exam. Peterson: I think it may be better to offer before we get through with Exhibit 1. Offer it, and I will pass on it.

Mr. Boyle: I make tender now.

Exam. Peterson: All right. Any objection?

Mr. Van Osdel: May we see the original?

The Witness: The original is in the original application that was sent to Washington.

Mr. Van Osdel: I thought you just compared it to a copy now.

Mr. Moore: Mr. Boyle, the document marked Applicant's Exhibit No. 1, has it been compared with the original?

Mr. Boyle: I think so.

Mr. Moore: The original being contained in the original application, I understand?

Mr. Boyle: Yes. It was a typical original.

Mr. Van Osdel: To the contrary, Mr. Peterson, I have compared the same with the original. They are not the same contracts at all.

Mr. Boyle: You mean the same form, I think.

Mr. Van Osdel: The original is called a trucking agreement. The copy is called a contract carrier's contract. I [fol. 80] have the same objection.

Mr. Boyle: Mr. Noble corrects me. The original, of which this is a copy, is on file with the Commission. We have not the original. The original I am handing you is the one out of Chicago. It is my mistake. I thought they were the same.

Mr. Van Osdel: For the purpose of laying an objection to Exhibit No. 1, I would like to ask Mr. Noble some questions.

By Mr. Van Osdel:

Q. Mr. Noble, the exhibit that has been identified as Applicant's Exhibit No. 1, the original, you say, of it is in Washington, D. C.?

A. It is.

Q. In the office of the Interstate Commerce Commission?

A. It is.

Q. In your grandfather file?

A. Yes.

Q. Or in the tariff files?

A. It should be in the grandfather application.

Mr. Van Osdel: Then, Mr. Examiner, let us take a few minutes and ascertain if it is in that file.

Mr. Moore: Let us compare it, too.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.

Mr. Moore: The so-called contract contained in the docket [fol. 81] filed here is not an original.

The Witness: Yes.

By Mr. Van Osdel:

Q. Mr. Noble, it appears from an examination of your grandfather file, there is no original. I will withdraw my question. I understand, I will wait until Mr. Noble has had an opportunity to look at the file. I ask you now, Mr. Noble, if you have had an opportunity to look over the grandfather file before you in this case?

A. Yes, sir.

Q. Do you find the original of what purports to be Applicant's Exhibit No. 1?

A. The original is not there.

Mr. Van Osdel: At this time, Mr. Examiner, we object to Applicant's Exhibit No. 1, for the reason that we have not had the opportunity to compare it with the original, nor do we know even if an original exists.

Mr. Boyle: Before ruling on the objection, I will ask Mr. Noble a question.

By Mr. Boyle:

Q. Mr. Noble, you signed and actually executed the original contract with Swift & Company in 1934, did you not?

A. I did.

Q. The copy of the contract that appears in the grandfather clause file of the Commission, was that transmitted to the Commission by you?

A. It was.

[fol. 82] Q. Was that copy made from the original at the time?

A. It was.

Q. Was it compared and found to be correct?

A. It was.

Q. Is it a true and correct copy of the original?

A. It is.

Q. Do you know at the moment just where the original is?

A. Well, probably it is in our files in Minneapolis. I couldn't swear to that. There is a copy of the original in Swift & Company's files.

Q. So far as your files are concerned, it may or may not have been lost or mislaid?

A. Yes.

Q. But that copy that reference has been made to is a true and correct copy and true in all details to the original?

A. Yes.

By Mr. Moore:

Q. Did you make the comparison word for word yourself?

A. I did not.

Q. How did you know that it corresponds in all details?

A. It is on the same form, same signatures, and a glancing comparison would indicate to me it is an exact copy.

Q. You have not made a comparison yourself word for word?

A. No, sir.

Q. You can't say of your own knowledge whether the [fol. 83] provisions are just exactly the same?

A. I would believe they are just the same.

Q. You can't say that of your own knowledge?

A. I could, yes.

Q. You have not compared it, though?

A. It is the same form.

Q. Is that the only reason for your statement, that they are precisely the same?

A. It is.

Mr. Moore: I object to the introduction of this exhibit on the ground there is no proper foundation laid or identification.

By Mr. Van Osdel:

Q. Did I understand you in answers you just made to counsel to say that although the original of Applicant's Exhibit No. 1 is not in this grandfather file, that there is, however, a copy there?

A. It is.

Q. Will you show me the copy?

A. There.

Q. Mr. Noble, do I understand that you are pointing to a copy of a contract in the grandfather application called Form, P. Form 818?

A. Yes.

Q. You say that that is a copy of the original, of Exhibit No. 1, of which we are now talking?

[fol. 84] A. Yes, sir.

Q. Well, now, I show you a copy of what your counsel says purports to be Applicant's Exhibit 1, and ask you if they are not entirely two different contracts?

A. This is an error.

Mr. Boyle: Yes. I thought we explained that.

The Witness: This one is an error.

Mr. Boyle: That was the Chicago contract.

Exam. Peterson: Exhibit No. 1 is an error?

Mr. Boyle: No, a copy.

Mr. Moore: That is something new, Examiner Peterson. The original was an error. I handed that back. Now it appears the copy you have is an error.

Mr. Boyle: There is no error in the contract. The idea is it is a different contract.

Exam. Peterson: How about Exhibit No. 1, is that an exact copy of the contract in the application?

Mr. Boyle: No. Exhibit No. 1 will have to be supplied during the day. The copy of this one that was taken on this form here, this form is slightly different from the old original.

Exam. Peterson: What about the exhibit marked number 1?

Mr. Boyle: The exhibit marked number 1 has really not been supplied yet. We find this particular copy that we have here——

Exam. Peterson: What has been marked No. 1? Something has been marked number 1 already. Is that an exact [fol. 85] copy of anything?

Mr. Boyle: Yes. That is not the exact copy of the contract about which we were talking.

Mr. Van Osdel: I believe I can bring that out.

By Mr. Van Osdel:

Q. Mr. Noble, what has been offered as Applicant's Exhibit No. 1 purports to be a copy of an original contract, the original contract of which is not in the grandfather file, is that correct?

A. Through error, this is not a copy of the original contract, yes, sir. The fact of the matter is, this is the original.

Exam. Peterson: Referring to the application?

The Witness: The application is the original, and during all of the various times when it has been necessary to file copies of contracts and file a schedule of minimum charges, and what not, this one here was apparently made at a later date.

By Exam. Peterson:

Q. Referring to Exhibit No. 1?

A. Yes. This was made at a later date. The original was signed by T. R. Jones. This one here has been executed by Swift & Company. Later in the period, see, when we called for some copies of the contracts, not having this original in our possession, they had not gone back far enough to supply me with copies of the original contract that was on that date.

By Mr. Moore:

Q. I ask you, then, the original of the contract is not on Form C-818-3, is it?

A. The original is on C-818. That is correct.

[fol. 86] Mr. Moore: Then, Mr. Examiner, this certainly is not proper evidence.

Mr. Boyle: No. We withdraw this. I could have saved all that time.

Exam. Peterson: Was Exhibit No. 1 withdrawn?

Mr. Boyle: For a correct copy to be made, and we will have that copy run off.

Mr. Fiddes: There is no exhibit in the record at all.

Exam. Peterson: No.

Mr. Fiddes: We will just start off.

Exam. Peterson: No exhibit No. 1.

Mr. Boyle: There is no number 1.

Exam. Peterson: Number 1, which we have been referring to and which has been already marked number 1, let the record show that it has been withdrawn.

Mr. Boyle: We want to get an amended or correct copy of the exhibit and it will be a true and correct copy of the contract in the grandfather file.

Mr. Fiddes: This is not a copy of anything we are talking about?

Mr. Boyle: That is right.

Mr. Fiddes: It is wholly a different contract.

Mr. Boyle: Due to the fact it is an old form. We will not be able to get the form. There are some slight changes been made, so we will have to have it typewritten in its [fol. 87] entirety.

Exam. Peterson: Yes. Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.

Mr. Van Osdel: I should like it understood that what is known and marked as Applicant's proposed Exhibit No. 1 is withdrawn from this record. Is that right?

Exam. Peterson: That is right. Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.

Mr. Fiddes: Am I correct, that what was offered was a copy on the printed form of an original contract somewhere and that it was prepared on a different form from the original, and therefore it is not a copy of an original contract. I understand that is correct?

Mr. Boyle: It is not the copy of the original contract that we are talking about.

Mr. Fiddes: Is it a copy of any original?

The Witness: That is a copy of the contract, but not the original.

Mr. Fiddes: It is not the original made on this date, November, 1934?

Mr. Boyle: That is not a copy of a contract with Swift & Company of November, 1934.

Mr. Fiddes: On that date?

[fol. 88] Mr. Boyle: No, but the ones that we will furnish you around noon time will be correct copies taken from and corresponding to the one in the grandfather file.

Mr. Van Osdel: Mr. Boyle, we will have available the original of the true and correct contract that is in the file?

Mr. Boyle: I am not sure whether we can locate it. If we can locate it, we will.

Exam. Peterson: This is not the original?

[fol. 89] Mr. Boyle: That is a copy.

Exam. Peterson: But you are going to have a copy made of the copy in the grandfather file?

Mr. Boyle: If we can locate it, we will.

By Mr. Boyle:

Q. Mr. Noble, will you describe the operation beginning in November, 1934, and continuing through 1934 to July 1, 1935?

A. We operated out of South St. Paul, Minneapolis and St. Paul for Swift & Company to various points and places in Wisconsin, Iowa, Illinois and North Dakota, and from various places in Illinois, Iowa, Wisconsin, to various places in Minnesota, and from Iowa to places in Illinois. I guess that about covers it.

Q. What was the character of the commodities that you handled for Swift & Company, not in detail, because you have said,—in a general way what were the commodities, character of the commodities?

A. We hauled fresh meat, packing house products, canned goods, butter, poultry, eggs, supplies of all kinds, such as machinery, chemicals and articles too numerous to mention.

Q. Sometimes referred to by the packers just as branch house supplies?

A. Yes.

Q. Could be meat blocks?

A. Yes.

[fol. 90] Q. Butcher aprons?

A. Yes.

Q. Advertising matter?

A. Yes.

Q. How about transportation of cheese?

A. We hauled cheese.

Q. Swift & Company is engaged in the dairy business, is it not?

A. They are.

Q. Now, just go ahead, Mr. Noble, and tell us about the operation after you started in November, 1934, as to whether the movements were regular or irregular with respect to particular schedules and particular places, and whether or not the routes were regular, or you were subject to the call of Swift & Company from and to places within the general territory?

A. The schedule was irregular. The destinations were very irregular. The commodities were irregular as to the actual contents. The service was one of supplementing rail service at the time, depending upon which they wanted to use, whether they wanted to send the truck to those places, or use rails. The service was scattered throughout the northwest territory for which the application is made.

Q. Now, how many trucks had you in operation in November, 1934?

A. Two.

Mr. Van Osdel: What was that question?

(The question was read.)

[fol. 91] By Mr. Boyle:

Q. In the handling of Swift's business, in the subsequent months of 1934 and prior to July 1, 1935, what developments, if any, took place in the distribution?

A. Well, I was called in by Swift & Company to a meeting in February, 1935, with a view of making store-door deliveries to the various places in Wisconsin.

Q. Well, now, let us be a little more clear on the store-door delivery. Prior to the time that this conference took place in February, 1935, what sort of deliveries were you making and what was contemplated in the conference of February, 1935, that would increase or augment or change that?

A. In the period from '34 up to the time of this conference, the general practice of Swift throughout the Wis-

consin territory was to use trucks to a break-bulk-point, which was a definite destination. In other words, to cover the state of Wisconsin and northern Illinois, certain designated points were the destination of shipments in this truckload or carload movement. Our service to that time was one of supplementing the rail service to these various points, such as Wisconsin Rapids, Antigo, Rhinelander, Green Bay, and various other points in Wisconsin, depending upon how Swift & Company wanted to ship it. A meeting in February, 1935, was held in view of developing a service, a through service, to the final destination of each shipment.

Q. Let us see if we can get it a little clearer. You are [fol. 92] familiar with what the packers term "peddler cars" or "car routes"?

A. I am.

Q. Is that a movement in railroad equipment?

A. It is.

Q. In the handling of their so-called peddler cars, would the movement be to break-bulk points, that is, from the point of origin to a particular destination, which would be the opening point of the car and from that point the car would peddle along over the route at a number of way stations or route stations?

A. Yes.

Q. The Commission's files are quite replete with that operation and all the practices concerning it?

A. Yes, sir.

Q. Now, you say you supplemented the rail service. Then you also stated you handled the commodities to the break-bulk point?

A. Yes.

Q. Does that mean that you transported the commodities, let us say, from Swift's plant at South St. Paul, from Minneapolis to one of these key destinations, which would be the break-bulk point where the original freight car would open up to begin its peddling?

A. Yes.

Q. At that time you did not perform the peddling operation of going beyond the break-bulk point to the local points on the route?

[fol. 93] A. I didn't.

Q. So the conference with Swift & Company in February, 1935, took up the question of your extending your opera-

tion or your service, if you please, to including the peddling at local points on the routes beyond the break-bulk point?

A. It was.

Q. What was the nature of that conference?

A. Well, the nature of the conference was to determine whether I would be willing to go into that type of service calling for an additional investment in trucks, changing the type of trucks that we had to trucks of better insulating value, to trucks built with a view to having the ability to handle the meat, equipped with rails, and equipped with a certain type of floor construction to keep it sanitary, whether I would entertain a proposition of that nature.

Q. Which would require additional investment and additional equipment, is that right?

A. Yes, sir.

Q. Were these trucks all refrigerator trucks?

A. That was their intention, yes, sir.

Q. At the conference, was there any agreement immediately made, or was there a further conference?

A. The conference I attended was left with the statement that you prepare a half a dozen trucks and we will put them in that type of service for a start.

[fol. 94] Q. And you so prepared?

A. Yes.

Q. Did that mean change or construct?

A. Construct these trucks, they would all have to be built with special bodies.

Q. Did Swift & Company at that time dictate the specifications of the trucks that they would require?

A. They did.

Q. Were those trucks that they would require more expensive than the ordinary truck that you had heretofore used?

A. Yes, sir.

Q. Is there heavier insulation?

A. Yes, sir.

Q. Was there present at the conference a Swift representative who specialized in automobile and truck construction with the idea of perfecting its carrying qualities?

A. He was there, yes, sir.

By Mr. Moore:

Q. What was his name?

A. E. W. Lager, Chicago.

By Mr. Boyle:

Q. Did you ask for this conference, or were you invited into it?

A. I was invited into it.

Q. It was not solicited by you?

A. Not at all.

Q. Following the February, 1935, conference, did you [fol. 95] take any steps towards acquiring this type of equipment that would be necessary, and what did you do in order to take on or perform the extra service?

A. I immediately had one additional truck built, which was delivered within three or four weeks after the date of the conference.

Q. You say probably some time in March, 1935?

A. It was, yes, sir.

Q. Did you have any other, or did you make any other capital expenditure for trucks to conform to the Swift specifications?

A. I followed it with another one in June.

Q. 1935?

A. 1935, and another one in September, '35, and another in December. Then I completed the fleet in January, February, and March of '36.

By Exam. Peterson:

Q. What date in June?

A. I beg your pardon?

Q. What date in June?

A. It was on June 10th when we took that job over.

By Mr. Boyle:

Q. When did you begin the service of these local points beyond the break-bulk point in line with the discussions?

A. October, 1935.

By Exam. Peterson:

Q. What date in October?

A. I think the first shipment was October 17th.

By Mr. Boyle:

Q. From that time up to the present you have continued [fol. 96] to perform that service?

A. I have, yes, sir.

Q. How was the service being handled before you began trucking from the break-bulk point to the local stations?

A. Well, it would go out of South St. Paul to the break-bulk point, either by car, rail car, or truck. There it would be unloaded, sorted up, placed in various trucks, which would cover the territory involved in that particular shipment.

Q. And peddled more in local territory, the territory from the break-bulk point?

A. It would, yes.

Q. There might be a number of trucks hauling in that shipment, whatever its consignement, from the break-bulk point?

A. Usually there would be three or four trucks used in the delivery of that shipment.

Q. And the operation you took over then was a through operation from the shipper's plant to the break-bulk point, and continuing on over the car route to the local destinations?

A. Yes, sir.

By Mr. Moore:

Q. That was closed doors from South St. Paul to the break-bulk point?

A. Closed doors to the first shipment.

Q. On the car route?

A. On the car route.

Q. Returning empty to St. Paul?

[fol. 97] A. No, sir.

By Mr. Boyle:

Q. Well, just tell me, if you want to amplify that, Swift & Company's business or requirements took your trucks beyond the end of that line for another load?

A. Swift & Company's policy has been to take charge of the truck within their ability to do so in furnishing a load from this territory to that territory, or some other place where this firm might need it. In the case of these peddler trucks, oftentimes there is not sufficient in the route to make a truckload. It might have a final destination at Milwaukee, Chicago, Fond du Lac or some other spot, to make up the proper load for the trip, at which place oftentimes they would have a return load to take back.

Q. Is there stability or fixity about these particular car routes, so that you would serve only one car route at all times, or would there, because of variation of tonnage, be suspension on the part of one car route, and then the truck would go over and finish on the other car route?

A. It would have irregular routes, depending upon the tonnage, depending upon the time of the year, as to whether you would serve the territory in one manner or in another, purely depending upon the feasibility of the movement.

Q. Would there be any operation such as a truck out of St. Paul to one of these car route territories and where, after making their deliveries on the car route, the car would [fol. 98] continue still with part of that load into Chicago?

A. It would.

Q. Would it be the policy of Swift & Company to load that truck back out of Chicago toward St. Paul with some of its commodities to some destination?

A. Yes.

Q. That was being done and is being done?

A. It is.

Q. Is that ordinarily the practice of Swift & Company?

A. It is.

By Mr. Moore:

Q. Suppose you had a full load to go out?

A. To go where?

Q. To these car route points, and were empty at the end of the car route?

A. If our schedule called for going to Chicago, the truck would go to Chicago for a return load. Now, if our orders were to pick up a load in Milwaukee, it would go into Milwaukee for a return load. If there was a load of cheese at Marshfield, it would pick up a load of cheese at Marshfield for return.

Q. If you didn't have any of those things it would come back empty?

A. No. We always made the round trip. We would deadhead into Chicago.

Q. Never deadhead back into St. Paul?

[fol. 99] A. Except in rare instances.

By Mr. Boyle:

Q. So far you have told of shipments you have handled for Swift & Company. Did you handle any shipments for Libby, McNeill & Libby?

A. I believe we handled a contract for Libby in January, '35. It was February of '35.

Q. What products did you haul for Libby?

A. I would say canned goods.

Q. Would that be various canned vegetables?

A. It would.

Q. Other edibles, preserves, and so on?

A. It would.

Q. Canned meats?

A. Yes.

Q. Canned milk?

A. Possibly.

Q. What was the extent of that operation?

A. Libby, McNeill & Libby, connected with Swift & Company. We would get our orders for the Libby, McNeill & Libby shipment at the Swift & Company Chicago office. It was operated in conjunction with many of the Swift operations.

Q. Were the Libby shipments largely from the Chicago district?

A. From Chicago.

Q. Blue Island?

A. Blue Island, Illinois, with possibly points in Wiscon-
[fol. 100] sin as they might develop.

Q. What is the destination territory of the Libby shipments?

A. They would be Minnesota and Wisconsin, out of Illinois; Minnesota out of Wisconsin.

Q. How about the regularity of the routes and service of the Libby shipments?

A. Irregular as to service and as to routes.

Q. Did you undertake to carry for Libby to such points in that territory as they might have shipments for?

A. Yes, sir.

Q. They had no regularity of movement, in the sense of having route cars, or anything of that sort?

A. No, sir.

Q. Now, prior to July 1, 1935, did you have any agreement with any one else? You have mentioned Swift and Libby.

A. Prior to July 1st, 1935, we had an agreement with the Kraft, Phenix Cheese corporation.

Q. About what date was that?

A. That was about June 1st, '35.

Q. And the Kraft Phenix corporation manufactures cheese?

A. Cheese.

Q. And kindred items.

A. Yes, sir.

Q. What was the operation contemplated by them?

A. The operation contemplated with Kraft was out of [fol. 101] Chicago and out of Freeport, Illinois, and out of various points in Wisconsin, to Minnesota, and principally——

Q. They have an operation out of Green Bay?

A. Yes, sir.

Q. Wisconsin.

A. Yes, sir.

Exam. Peterson: May I interrupt here a moment.

By Exam. Peterson:

Q. You did not distinguish the kindred items. What are the kindred items?

A. Mayonnaise salad dressing, candies, many items I would not even know.

By Mr. Mattimore:

Q. Did you have a contract with Libby, McNeill & Libby?

A. I beg your pardon?

Q. Did you have a written contract with them?

A. With whom?

Q. Libby, McNeill & Libby, and the Kraft Phenix Cheese.

A. Yes.

Q. Do you have those?

A. We have the Libby. I think we have a portion of the Kraft here.

Mr. Boyle: We have not received any permission to show them, to exhibit those. Until we get permission from the shipper, we can't do it.

Mr. Mattimore: If the Examiner please I am going to ob- [fol. 102] ject to any further testimony on these contracts until they are produced.

Mr. Boyle: I have not offered any contract.

Mr. Mattimore: You say you have a contract. I object to this testimony as not being the best evidence. The contract is what we want to see.

Mr. Boyle: I did not ask about the terms of the contract. I have not offered the contract at all.

Mr. Moore: You asked what is contemplated by the contract.

Mr. Boyle: What was in the negotiations leading up to it, the discussions. That is all right.

Mr. Moore: If you are going to qualify it, all right.

By Mr. Boyle:

Q. What was the actual operation with respect to the Kraft business?

A. The Kraft business did not get started until March, 1936.

Q. Starting then, how was that handled? Give us a general description of that.

A. Well, when we finally got everything going with Kraft, why, we moved principally mayonnaise out of Chicago, cheese, and cheese principally out of Green Bay, and Plymouth, Wisconsin, to the Twin Cities; occasionally out of Freeport, Illinois, to the Twin Cities for Kraft.

Q. What were the destinations to which you hauled that cheese for Kraft?

A. The destinations would be Minneapolis, St. Paul, St. [fol. 103] Cloud, and occasionally to Fargo, and Grand Forks, North Dakota.

Q. North Dakota?

A. Yes, North Dakota.

Q. Now, was there any other industry for whom you were performing transportation service prior to July 1, 1935?

A. No, sir.

Q. Was there any other for whom you performed a transportation service, any agreement, verbal or otherwise, after July 1, 1935, and prior to January 1, 1936?

A. No.

Q. Did you take due steps to procure the necessary licenses and certificates from the various states in which you operated?

A. I did.

Q. Did you obtain such certificates or licenses?

A. I did.

Q. To the best of your knowledge and belief did you comply with the various state laws?

A. I did.

Q. Are you still performing these services for Swift, Libby and Kraft, that you have told us about?

A. I am.

Q. Have you continuously performed them from the time that you told us they had their inception up to date?

A. I have.

[fol. 104] Q. Are you desirous of continuing your engagement or service?

A. I am.

Q. Have you prepared, or had prepared immediately under your direction, a list of shipments transported by your company from November 17, 1934, to July 1, 1935, and from July 1, 1935, to October 15, 1935?

A. I have.

Q. And have you prepared along the same line a further similar list of your transportation described by general commodities or origin, destination, for the years 1936, 1937, 1938, for three months' periods in each of those years?

A. I have.

Q. Was there anything influencing your selection of the months of the several years, 1936, '7 and '8?

A. Merely to get them representative, one from this point, and one for those months of each year, not necessarily duplicates.

Q. Well, the exhibit that we will offer will show three months. I have in mind that they alternate them. If you took January, May and October of one year, he would take February, June and September of the next. There was no point in the selection other than to have a showing that would be representative and indicative of what the operation for that year would be. Is that correct?

A. That is.

Q. In other words, three months were taken as typical of the year?

[fol. 105] A. Yes.

Q. Did you also have prepared immediately under your direction a map showing some of the territory in which you operated and are operating with particular reference to the State of Minnesota and immediately contiguous territory, I mean the state of Wisconsin?

A. I did.

Mr. Boyle: Off the record, please.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.

Mr. Boyle: Now, Mr. Examiner, at this point might we suspend for a few minutes, until these exhibits are distributed?

Exam. Peterson: Very well.

Mr. Boyle: Do we have copies of the map?

(A short recess was taken.)

Mr. Boyle: Are we ready to proceed, Mr. Examiner?

Exam. Peterson: Yes, sir.

Mr. Slattery: My name is Slattery, T. J. Slattery, appearing for the various railroads being noted. The same railroads are shown on the list there.

Exam. Peterson: You have been admitted to practice?

Mr. Slattery: Yes.

Exam. Peterson: Will you state on the record the reason [fol. 106] for your appearance? The interest of the railroads in this particular case.

Mr. Slattery: Was that stated by the others?

Exam. Peterson: Yes.

Mr. Slattery: I appear for the same railroads.

Mr. Boyle: The next exhibit is No. 2.

Exam. Peterson: Number 2?

Mr. Boyle: I ask to have marked for identification the map, copies of which have been distributed, for Exhibit No. 2.

(Applicant's Exhibit 2, Witness Noble, identified.)

By Mr. Boyle:

Q. Along with the map, the appendix, which is really a part of the map, and explains in more detail the points which could not be placed on the map for lack of space and legibility.

A. Yes.

Mr. Boyle: Have that marked Exhibit No. 3.

(Applicant's Exhibit 3, Witness Noble, identified.)

Mr. Boyle: This will be the appendix to the map, and show points where deliveries were made in irregular route distribution, and plant sales. The next is Exhibit 4 for identification.

(Applicant's Exhibit 4, Witness Noble, identified.)

Mr. Boyle: Partial list of commodities transported by Noble Transit Company.

[fol. 107] Number 5 is a summary of representative freight bills from November, 1934, to July, 1935.

(Applicant's exhibit 5, Witness Noble, identified.)

Mr. Boyle: Number 6, the continuation from July 1, 1935, to October 15th, 1935.

(Applicant's exhibit 6, Witness Noble, identified.)

Mr. Boyle: As number 7, continuation through 1936, and showing representative months of February, May and September.

(Applicant's exhibit 7, Witness Noble, identified.)

Mr. Boyle: Number 8, representative months of 1937, January, June and October.

(Applicant's exhibit 8, Witness Noble, identified.)

Mr. Boyle: Number 9 is similar information for four months in 1938, January, April, July and August.

(Applicant's exhibit 9, Witness Noble, identified.)

Mr. Moore: Do you expect to introduce that, in that order?

Mr. Boyle: Yes. The idea was to keep it in chronological order.

By Mr. Boyle:

Q. Mr. Noble, will you talk up, please. The map which has been marked for identification No. 2; referring also, if you have need for a clearer explanation, to exhibit No. 3, the appendix to the map, state its preparation and give us some brief description.

A. This map has been prepared, showing representative towns throughout the northwest where deliveries have been [fol. 108] made of Swift's commodities, which are listed in another exhibit, together with those which have been circled, showing operation of the car route distribution, each circle representing a Swift route, which is peddled or delivered by us at the present time. The towns involved in these various route numbers are shown in Exhibit No. 3, which is the appendix to the map. The square index points actually served prior to July 1st, 1935, and triangle notation showing the points where representative freight bills can be shown up to October 15th, 1935. The combination points, squares and circles, showing our present operation.

Q. In other words, what you are endeavoring to show by this map, by the squares, are the points in this territory

actually served and at which actual deliveries were made on and prior to July 1, 1935?

A. That is correct.

Q. The triangle additional points similarly served after July 1, 1935, and up to October 15th, 1935?

A. Yes, sir, that is correct.

Q. Up to October 15th, 1935, the squares and triangles indicate the points served?

A. Yes, sir.

Q. And the circled points you refer to as the car route points. I wish you would explain that more in detail, and tell what those numbers are, and why those particular [fol. 109] points that are circled appear on the map.

A. Well, Swift & Company's car route operation is handled, as stated before, to one major break-bulk point, such as Wisconsin Rapids, Beaver Dam, Burlington, North Freedom, Baraboo, and various points, being the towns generally listed here on the map. The circle together with that indicates the additional towns served with that truck.

[fol. 110] Q. Do the points circled carrying numbers, and in one instance a letter, indicate so-called break-bulk points of the car routes to which you referred earlier in your testimony?

A. They do. Now, a car route point may have had two circles. A break-bulk point may have had two circles. In other words, there may have been two routes in that particular car.

Q. I do not need to go into detail about any change of operation from the rail peddler car to the motor truck. The point is, these circular points here are the main or designating points in that particular car route, or sales route. It is what you might term key points, if you please.

A. The one where the volume or where the larger percentage of deliveries are made within one town.

Q. What do the numbers in those circles mean?

A. They are Swift's car routes.

Q. That is for their own convenience?

A. Yes.

Q. They designate these particular routes by numbers?

A. They do.

Q. You have, for equal convenience, just used the same numbers?

A. Yes, sir.

Q. Where a circle appears with a number in it, what, if any other towns in that territory were served?

A. Oh, there might be 25 towns served in addition to that particular town where the circle appears.

[fol. 111] Q. Does your statement marked for identification, exhibit 3, give the list of those towns in each car route?

A. It does, yes.

Q. Let us take one just for an illustration, the first one on there, the list marked for identification exhibit 3, the break-bulk point Eau Claire?

A. Yes, sir.

Q. Following that is the figure 1, in the red pencil?

A. Yes.

Q. I might say for the purpose of clarity, we do not have time to have those numbers put on this exhibit 3. We had to go through them with hand, and put them on with pencil. They key into the numbers on the map.

Exam. Peterson: Is there a number for Eau Claire?

The Witness: It is No. 1.

Exam. Peterson: Yes.

By Mr. Boyle:

Q. In red pencil. We would have had them on there in more permanent form, if we had had time. It was overlooked. We had to do it this way. Now, just explain now that operation after the truck gets to Eau Claire, which is No. 1, what is the meaning of these towns that appear here on exhibit 3?

A. Those particular towns are towns involved in a truckload of merchandise where Eau Claire would carry the route number. In other words, Eau Claire would have—the truck [fol. 112] having Eau Claire as the destination would also have Black River Falls, Chippewa Falls, Fallcreek, Augusta, Fairchild——

Q. Don't read them all.

A. A certain part of those towns would be on that particular truck, depending also as to the time of the week, what the delivery service that is required by Swift calls for.

Q. Is it correct to say that all of the towns appearing on this exhibit 3 under Eau Claire, are towns on what they term the Eau Claire car route, sales route?

A. It is.

Mr. Boyle: There will be further explanation on that by Swift & Company, in the details of that.

Mr. Mattimore: Where did you start that?

Mr. Boyle: May I just continue this, please? I would prefer the questions be reserved for cross-examination.

Exam. Peterson: All right.

By Mr. Boyle:

Q. Let us follow that, for example, over the map. There is a circle 1 opposite Eau Claire?

A. Yes, sir.

Q. Now, just for illustration take that truck from Minneapolis or St. Paul over this so-called Eau Claire route, and give us an idea of the character of the operation.

A. Well, on Monday, that is, this Eau Claire, Eau Claire proper is served four times a week. It is served for delivery on Monday, on Wednesday, Thursday and Friday.

[fol. 113] By Exam. Peterson:

Q. Are you speaking of the present time?

A. Yes.

Q. Or before July 1?

A. This present time. We do not show where we have delivered this in car routes prior to July.

Mr. Boyle: Mr. Examiner, this map up to this time is not being tied in with any dates. We were coming to the detail of that when we got to the detail of the shipment, as soon as I got through having the witness explain the move.

Exam. Peterson: I think the record ought to show what he is testifying about, any particular period.

Mr. Boyle: The record will in just a moment, show which period in the chronological order of the detailed shipments which will follow.

The Witness: Yes.

Mr. Boyle: When we get to those points, then if we have the map here, it will make it clearer to follow. All I want to do now is to have this map explained so when a later reference is made, it will be clear.

Exam. Peterson: He testified "we were doing so-and-so". It was not clear.

By Mr. Boyle:

Q. Your point is, as to whether or not what he said about Monday, that there are deliveries, applies to the date, or when it applies. I think maybe that should be clarified.

A. That is the present operation.

[fol. 114] Q. What was it last year?

A. The same thing.

Q. And what was it in 1935?

A. I am not in a position to answer.

Q. A Swift & Company witness who will follow will answer any questions on that?

A. Yes, sir.

Mr. Mattimore: Mr. Examiner, I think if we go along here we ought to have the time because we are going through this map. If we are going through this entire map without knowing when the shipments were made, it is taking up unnecessary testimony at this time.

Mr. Boyle: Up to this point, Mr. Examiner, I have not said a word about any shipment.

Mr. Mattimore: We want to know about the shipments.

Mr. Boyle: I am going to conduct this case my way, except as to the ruling of the Examiner.

Mr. Mattimore: I am making my objections to the manner in which you are trying it. I think we are entitled to know when these shipments were made, as you have described them on the map.

Exam. Peterson: He testified where the shipments were made.

Mr. Boyle: I did not mean for him to testify to any shipments being made.

[fol. 115] Mr. Mattimore: Why is the map material, then?

Mr. Boyle: These exhibits all are a part and parcel of the same thing. As a matter of fact, they might all have been the same exhibit, but for the purpose of convenience, are numbered separately. I ask to be allowed to proceed with an explanation of this map. Counsel will have every right to object to its introduction at the time when I offer it. Up to this time and point, it has not been offered. He can move to strike out any of this testimony then.

Exam. Peterson: Go ahead.

By Mr. Boyle:

Q. I want you to give us an outline so as to key the numbered points into this point there, about a truck coming down to Eau Claire, or any other point that is numbered. What happens to it afterward, how does it get to these other points?

A. The truck which leaves South St. Paul——

Mr. Mattimore: Just a minute; if the Examiner please, I object to any testimony here until such time as he will state what shipments were made.

Exam. Peterson: I think that is what the Commission wants to know.

Mr. Mattimore: If he is talking about a shipment that was made in 1938, certainly this Commission is not interested in it at this time.

Mr. Van Osdel: It may be interested later. We ought, [fol. 116] to have first, what are the grandfather operations.

Exam. Peterson: That is right.

Mr. Boyle: If the Examiner please, I think it is the applicant's privilege to present his case in his own fashion, to the best of his ability, endeavoring to give the Commission all of the information, but following the regular rules of procedure. I am not going to get into an argument here with these gentlemen about what my purpose is for showing present operation, 1936 operation, or 1937 operation, and I shall insist with all the vigor that I possess upon the introduction of testimony as to shipments made during that period, and as to any other facts relating to it. Now, when we get to the argument of this case, we may discuss just what may go into the grandfather clause, and so on, and whether or not the Commission is going to consider any evidence from July 1, 1935, but I don't think this is the time to discuss it. That is a matter of argument.

Mr. Moore: We have the right to have the time fixed.

Exam. Peterson: Mr. Boyle, I think he should, as long as he is testifying about what a truck did, or does. I don't think the Commission wants to know whether he did it, or does it, and this truck does so-and-so. Is that at the present time, or when was it?

Mr. Boyle: I will take him over all of it.

By Mr. Boyle:

Q. What is it doing now?

[fol. 117] A. The truck at the present time is moving from South St. Paul with Route 1 and 80 as its destination——

Mr. Fiddes: Is that two routes?

The Witness: We are speaking of a Monday delivery; on a Monday delivery, the truck would make Eau Claire, run over to Chippewa Falls and take the towns from Chippewa Falls east, hitting towns such as Owen, Abbotsford, Spencer, Greenwood, Thorp, Stanley and probably others, depending on the customers as to whether they usually purchase from Swift on that particular day. Take a Wednesday delivery, that truck would go from Eau Claire to Marshfield, working such towns as Fairfield, Neillsville, Augusta and Fall Creek. On Thursday, the Monday operation would probably be continued, taking in different routes that might be necessary to reach the destinations of the truck, depending upon whether there are orders for these particular towns or not, changing those routes to the various towns in case it would be quicker and less difficult to get to a town by a different route. Assuming that one town had been left off, then on Friday, the Eau Claire truck would be delivering the same as on Wednesday, and taking in additional territory, depending on whether the orders would be on the truck or not, th-ough Mondovi, Osseo, Strum.

Q. Would there be a similar explanation as that for the specific local points as to the other circle number points?

A. The operation would be practically identical.

[fol. 118] Q. The days might be different?

A. Yes.

Q. Now, when did you first start making deliveries at the points beyond the break-bulk, or circle points?

A. It was in October, 1935.

Q. I think you answered the Examiner's question a little earlier, you thought it was October 17th?

A. That was my belief.

Q. Now, the detail of that will appear in the subsequent exhibit, will it not?

A. It should.

Q. The character, general typical character of this operation in here that you have described, using Eau Claire merely as representative, has been substantially the same

since October 17th, 1935, when you first started performing the service?

A. It has.

Q. Now, pass for the time being to exhibit No. 4 for identification, a partial list of commodities transported. Will you explain that, saying what you mean by outbound and inbound as appears on the headings of the sheets?

A. These lists of partial commodities have been prepared where the items have been taken off of representative bills of lading bills of lading that we have had in our files. Outbound meaning out of the Twin Cities; inbound meaning as bringing us back to our home territory, which [fol. 119] is St. Paul, Minneapolis, South St. Paul.

Q. Would it include commodities out of Chicago?

A. Generally speaking, the commodities are out of Chicago, Illinois and eastern towns, with the destination in Minnesota.

Q. These specific commodities have actually been taken from the bills of lading themselves?

A. They have.

Q. At page 1 of that exhibit, which covers the period from November 17th, 1934, to July 1, 1935?

A. It does.

Q. And the subsequent pages supplement that for July to October, '35, and for three months in September, three months in 1936, and three months in 1937, and four months in '38?

A. That is correct.

Q. All of these commodities actually were transported during the period shown at the heading on that?

A. That is correct.

Q. Going now to the preparation that is headed "Summary Representative Freight Bills, November, 1934, to July, 1935", marked exhibit——

Exam. Peterson: Just a moment. May I interrupt?

Mr. Boyle: Yes.

Exam. Peterson: In connection with exhibit No. 4:

By Exam. Peterson:

Q. You say, outbound and inbound. Outbound. Outbound what?

[fol. 120] A. Twin Cities, of Minnesota.

Q. Inbound?

A. From Illinois, Wisconsin, or points east.

By Mr. Boyle:

Q. In Iowa?

A. Or possibly Iowa. In other words, the Twin Cities is our headquarters.

By Exam. Peterson:

Q. That has to do with each outbound and each inbound list?

A. Yes.

Exam. Peterson: That is all.

By Mr. Boyle:

Q. Is this intended to give a reasonable comprehensive idea of the commodities actually transported in the several periods enumerated?

A. The idea is to give a representative picture of what commodities were actually transported.

Q. In the handling of the business of Swift & Company where they have branch house supplies, and such things, do you always know exactly what the commodity is?

A. We are not in a position to know what the commodity is on any shipment to a branch house prior to the time we were making store-door-deliveries, we were not in a position to know what was on the plant sales trucks, or trucks being sealed at South St. Paul, and delivered possibly to the destination under seal.

Q. In your agreement with Swift & Company, have you transported all commodities offered?

[fol. 121] A. Yes, sir.

Q. Now does there appear in the beginning of exhibit No. 5, a list of commodities shipped and received by Swift & Company?

A. Yes, sir.

Q. Where was that, how was that list made up?

A. That list was prepared by us from a list given us by Swift & Company as a list typical of the type of articles and the articles actually used by Swift & Company at various places within these districts, as to produce plants, branch houses.

Q. Which you said, under your agreement with Swift, you either transported or agreed to have transported?

A. Offered and did transport.

Q. And that will be further related by a witness from Swift & Company. Proceed with a brief explanation of the details showing the date, the shipper, the consignee, point of origin, and destination with the general commodity description, starting on sheet page No. 1 of exhibit No. 5.

A. Well, this exhibit has been prepared——

Q. Just state from what it has been taken?

A. This exhibit has been prepared from representative bills of lading that we have in our files showing Swift & Company as a consignee, the shipper, bills of lading showing point of origin and destination, what the commodity is and description of the commodity. In fact, as in certain items and where it was to a break-bulk point, the commodity [fol. 122] was listed as plant sales. Was not able to describe the commodities in particular.

Q. What is meant by plant sales, you understand will be testified to by a witness of Swift & Company; that is correct?

A. That is correct.

Q. Where you have general commodities one or two places appearing, what does that mean?

A. General commodities are shown where the items mentioned on the bill of lading were of such a character that there would be no definite heading that would list them correctly, except as subjects, general commodities, such as a list of general commodities.

Q. Can you give us an illustration?

A. There was a truck that had broken glass on it, together with fresh meat, together with eggs and other items. It would be hard to list that except as general commodities.

Q. Because of the assortment of commodities?

A. Another truck might have items: labels, thermometers, cotton bags, all on the same shipment. A shipment of that nature has been listed as general commodities.

By Exam. Peterson:

Q. Can you, in connection with the shipment of February 1, 1935, show just what those general commodities consisted of, whether there was four, five, six, or ten, or what, on page 1?

A. We feel we have given a pretty definite picture. We are willing you should pick out the item, and we will pick [fol. 123] out the commodities as to what they actually were.

Q. What are, to make the rest of it clear.

A. All right.

Q. If you know, what kind of general commodities?

Mr. Boyle: In February 1, 1935?

Exam. Peterson: It might save time later on.

By Mr. Boyle:

Q. One going to Chicago, and one going to Sioux City?

A. Well, on this particular truck——

Q. Which one now, do you refer to?

A. 21, South St. Paul, bill originating Sioux City.

Exam. Peterson: I was asking about February 1, 1935.

Mr. Boyle: That is the one.

By Exam. Peterson:

Q. That is from South St. Paul to Chicago?

A. Sioux City.

By Mr. Boyle:

Q. There is one to Sioux City. Suppose you give the Examiner the Sioux City one, and also one to Chicago.

A. Here is Chicago, 29 empty hogheads, one box of broken glass, one bunch of truss hoops, 100 pieces of veal fronts, one thermometer, one box of pistachio nuts, 20 boxes of chucks, another shipment of meat, one box of poultry and 29 empty twin hoops.

Q. Is that Sioux City to Chicago?

A. That is to Chicago.

Exam. Peterson: February 1st, 1935?

[fol. 124] Mr. Boyle: Yes.

By Mr. Boyle:

Q. Give us the Sioux City one.

A. We have two boxes of sausage. We have got 20 barrels of cracklins. We have got 50 boxes of jars, glass jars that we listed as general commodities.

By Exam. Peterson:

Q. How many articles did you figure would be considered general commodities?

A. We have prepared an exhibit here,—to have gone into each line here, to have shown each individual item, we believe is not necessary; but we are prepared to list at any points you might mention, what the actual items we have hauled on that particular trip, are.

Mr. Boyle: It was also for the purpose of having a full list of commodities that Swift & Company ship.

Exam. Peterson: Proceed.

Mr. Boyle: At one time or another, those commodities in more or less varied assortments, moved.

By Mr. Boyle:

Q. Mr. Noble, the applicant's exhibit No. 5, carries out the same idea as to separation and what it shows for the period up to July 1, 1935, doesn't it?

A. It does.

Q. I notice in the back of that exhibit a list of towns on the various car routes, rather a duplication of our exhibit No. 3, I take it?

A. It is.

[fol. 125] Q. It is just there for convenience?

A. Yes, sir.

Q. Now, exhibit No. 6, marked for identification No. 6, purporting to show similar information for the period of July 1, 1935; to October 15th, 1935. Is there any comment you think necessary to make about that, which differentiates it from the preceding exhibit as to the period covered?

A. The period is different. The only thing in this particular exhibit that is not shown, I believe, the fact we had started store-door delivery in the Beaver Dam territory. Beaver Dam and Waukesha, in October.

By Exam. Peterson:

Q. October 17th?

A. Yes, October 16th, as a matter of fact.

Q. We are talking about exhibit No. 6.

A. Yes, we are in that exhibit.

Q. October 15th is the last?
A. Yes.

By Mr. Boyle:

Q. Returning for a moment to exhibit No. 5, we have talked a great deal about Swift & Company. The exhibit which, of course, speaks for itself; shows shipments handled for other than Swift & Company, the Omaha Packing Company, Libby, Derby Foods, Central Cheese, Hammond, Plankington Packing, and others?

A. Yes, sir. All of the destination of one type or another of Swift & Company. That is, Swift & Company were [fol. 126] involved in the entire operation in some manner.

By Mr. Fiddes:

Q. Are those subsidiaries of Swift & Company?
A. Not all of them.

By Mr. Boyle:

Q. Now, subsequent to October 15th, 1935, we have marked for identification exhibit No. 7, purporting to show similar information for three representative months in 1936?

A. Yes, sir.

Q. I think you stated earlier in your examination that there was no particular point in the selection of those three months. You might have taken any other three. They were as nearly seasonal as you thought would be typical, is that correct?

A. That is correct.

Q. When you took the following year, 1937, you purposely took different months so as to alternate them?

A. Yes, sir.

Q. No particular point in that other than to avoid any accusation of having selected the months, is that it?

A. That is correct.

Q. And had you shown, for instance, for 1936, twelve months instead of the three months, I take it it would have entailed considerable more work. It was with the idea of avoiding the work?

A. It would have been merely repetition, that is all.

Q. You consider that the three months shown for 1936, [fol. 127] are typical for that year?

A. I do.

Q. There were operations during the other nine months of the year, similar to those appearing on No. 7?

A. Yes.

Q. Would the same statement be true as to the preparation marked for identification exhibit No. 8 for the three months of 1937?

A. They would be, correct.

Q. The same for the four months in 1938?

A. That is correct.

Q. I notice we have four months in 1938 as against the three months in the other several years; was that for the purpose of bringing as nearly down to date as complete as time would permit?

A. That is true.

Q. For each of those years, '37 and '8, the operation during the months not shown were similar to the operation during the months actually shown?

A. That is correct.

Q. What is your present equipment, Mr. Noble?

A. We have 15 trailers, 14 tractors and one straight job.

Q. Just what do you mean by a straight job?

A. It is just a truck, that is, not a semi-trailer, with a refrigerator body.

[fol. 128] Q. And those trucks are all refrigerator trucks?

A. They are.

Q. How many of them conform to the specifications of Swift & Company, that they dictated, early in 1935?

A. They all do. We rebuilt the two previous ones to conform to Swift's specifications.

Mr. Boyle: With the right to recall the witness as developments might indicate the desirability of it, I rest the direct examination of the witness with you. I offer in evidence the exhibits which have been identified as Nos. 2 to 9 inclusive.

(Discussion outside the record.)

Mr. Boyle: We might as well get that straightened out now, if there is any idea. I thought that when we gave them the statement here taking in the details that are shown here, that was sufficient.

Exam. Peterson: No, they do not, not these exhibits, statements of shipments. They generally submit in evidence statements of shipments and they have the documents at the hearing room for examination by the protes-

fants, because just the statement in this case, is not evidence.

Mr. Boyle: Let me state that we have here all of the freight bills and other supporting data, so far as we were able to collect it, on all of the operations, since November 17th, 1934, for the Commission's inspection, and perusal in any way at all. We have the supporting bills of lading [fol. 129] for all of that, showing in detail the consignee, commodity, destination, various weights and so on. That, however, I tender only for the Commission's inspection. I do not find that I have authority in law even if I wanted to do anything else. And as I read the law, gentlemen who solicit that information, are likewise subject to prosecution. So, wanting to stay within the law, I will tender to the Commission, and will stay, or have someone stay and work with them, for all of the examination they want, if they think the documents so far offered are not sufficient.

Mr. Mattimore: Are these offered?

Mr. Boyle: Yes. So far as the indiyidual freight bills are concerned, it is confidential information which will disclose customers' secrets. We have not been authorized by any of our shippers to give that information in such detail. Unless we were, it seems to me that we would be subject to the penalties in Section 222, and Section D, after providing for the sanctity of confidential information offered to the Commission, imposes a penalty upon and agent or examiner who divulges facts which come to his knowledge during the course of his examination, and so on. Section E makes it unlawful for any motor carrier engaged in interstate commerce to disclose, or to permit to be acquired by any person other than the shipper, or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered to [fol. 130] such common carrier or broker for transportation, and provides a penalty for such disclosure. So, under that provision of the law, naturally we couldn't do it.

Exam. Peterson: Mr. Boyle, doesn't that have to do with inspections made by supervisors, or examiners in connection with the work to determine whether violations have occurred, or for any other purpose?

Mr. Boyle: No. There is a specific provision here on disclosure, by examiners, and criminal prosecution. The general provision here in Section 222 E is very close to

part I of the Act. I could give you direct reference to the section if I had a copy of the Act with me. That prevents a disclosure, so much so that there has been objection to the introduction of waybills at some of the hearings, where the shipper objected. He has competitors about, and his trade secrets are disclosed.

Exam. Peterson: You know in reparation cases, for example, they have to submit evidence to the railroad where your payment depends, on which they submit reparation.

Mr. Boyle: We are submitting evidence to the railroad, a detailed list, which they check against their own records.

Exam. Peterson: Yes.

Mr. Boyle: This is nothing about a railroad record.

Exam. Peterson: It is also for inspection by anyone that wants to examine the ticket.

[fol. 131] Mr. Boyle: No, we can't submit it to anyone else.

Exam. Peterson: In regular rate cases?

Mr. Boyle: The statement is prepared from your freight bills, and submitted to the railroads for checking. It is not submitted to any competing concern.

Exam. Peterson: They show it to the Commission. They are on file with the Commission for inspection by anyone.

Mr. Boyle: Yes. I seriously doubt that the Commission could disclose those to other people.

Exam. Peterson: They are in the docket. They are public. They have been doing that for years.

Mr. Boyle: This is a little bit different proceeding here, where we have information that is of a confidential nature, for a shipper to disclose his customers by name, it would disclose the quantity, commodity that they bought, and so on. We are willing to give information of the kind that we have, and we have thought that under the Commission's rules, that was all that was required. We are ready to give to the Commission for its own inspection only, every freight bill and bill of lading that we have since the beginning of the operation right down to date, but we are not willing that these documents get into the hands of others. I don't believe we can under the law.

Mr. Moore: How are we going to cross-examine if we do not have the document from which it is taken? This is [fol. 132] only a copy of the original document.

Mr. Boyle: He could have testified orally without putting it on a sheet for your convenience.

Mr. Mattimore: He can't testify, when the documents themselves are the best evidence. We are going to object to the introduction of these exhibits until such time as the supporting evidence is produced.

Mr. Fiddes: We join in that.

Mr. Van Osdel: We join too.

Mr. Edell: We all join in it.

Mr. Van Osdel: Does the Examiner want to hear us on this point?

Exam. Peterson: I want to know what your views are.

Mr. Van Osdel: First of all, counsel for the applicant is apprehensive about disclosing the shipper and the merchandise hauled. Now, in the exhibit he has already prepared——

Mr. Boyle: Put the consignee in there too.

Mr. Van Osdel: All those matters are already disclosed in the exhibit. It is from Swift to a certain point, from a certain point, and the commodity is named. However, in some instances in those particular cases which I am interested in, there are general commodities listed. What are the general commodities of that particular shipment? I think it is only fair and reasonable that under the circumstances we see, or at least have an opportunity to examine the territory to cross-examine on those documents from [fol. 133] which these particular lists are prepared. Now, if we were in an informal conference before, say in the District Director's office, the same procedure would be followed, namely: that the applicant would come in and would submit his proof. Then, because he wanted to retain that proof, because the Interstate Commerce Commission was not interested in burdening the file, he would give them a list of what he submitted. This is only a similar procedure. Surely this list was not submitted with the thought it would substitute for the actual freight bills themselves. It was naturally submitted because they did not want to put all of their freight bills in the record. With that, we are certainly in accord, that that would be very burdensome, but we must have those records here for examination. Under the law that the counsel for the applicant has quoted, it is not applicable to the situation here. However, if applicant does not wish to submit any proof, that is his own case because the exhibits he has in here are no proof. I would be perfectly willing to rest on that.

Exam. Peterson: If applicant is going to submit these documents for inspection for the Examiner alone, I am going to ask that they be put in the record at that time, because I want the Commission back in Washington to know what is in those exhibits, and that the protestants have an opportunity to look at them; that they agree that those documents are in accordance with the exhibits here, [fol. 134] and I have to look at them, too. That is a different matter.

Mr. Boyle: Why can't they select such a list from the exhibit, and have their questions all confined to dates that will not make us disclose any confidential information. The consignees, I don't think it is any of their concern. We would be glad to give them that information.

Exam. Peterson: I don't think the protestants are going to look at every single document there. They want to have the opportunity to look at any one, anything they select in particular.

Mr. Moore: And question about any we may select.

Mr. Boyle: Why can't they recheck the shipments from the statement there, that they want to question further on, and we will proceed.

Exam. Peterson: Perhaps there won't be so many waybills that they will call for. I assume that they will want to know what you mean by general commodities. I know the Commission would like to know.

Mr. Boyle: We have endeavored to explain them to you.

Exam. Peterson: There might be a lot of other shipments; that is not clear at all to the Examiner, as to whether all of the shipments, whether the shipments cover all commodities listed in your exhibit Nos. 4 and 5.

Mr. Boyle: Beginning with abrasives, acids, advertising [fol. 135] matter, automobile parts——

Exam. Peterson: There is nothing so far that shows conclusively, or shows at all, that all of these commodities so moved.

Mr. Boyle: We show that in exhibit 4.

Mr. Fiddes: There is always a possibility in making up exhibits so bulky as these, an error might occur. I don't think we are required to accept the accuracy of them on the mere statement they were accurately prepared.

Exam. Peterson: Moreover, for example, you have box lumber. To how many points, or from how many points does the box lumber move?

Mr. Van Osdel: Not only that, Examiner Peterson, there will be in here undoubtedly many shipments that were possibly carried by some other carrier. We want to see the delivery receipt. That is only natural.

Mr. Boyle: If they will select the shipments they want to question.

Mr. Moore: We will have you select the ones we want to talk about.

Mr. Boyle: I spoke seriously. We will see what we can do about giving you that information. We have no authority to give you that information.

Mr. Moore: You have the bills of lading here.

Mr. Boyle: Yes, for the Commission.

[fol. 136] Mr. Walsh: Just give us the same information.

Mr. Mattimore: Are they any different than the bill?

Mr. Boyle: Much more detail.

Mr. Mattimore: The commodity?

Mr. Boyle: The consignee.

Mr. Edell: Mr. Examiner, the objectors are carriers and no competitors of the shippers. We certainly have no interest or trade secrets. We probably would not recognize a trade secret if we saw one. We are merely interested in having this operator submit proof of an alleged operation, and certainly we are enfitled to see that proof. The consignees mean nothing to us, but operations mean everything to us. I think that counsel's statements are very poorly founded. He is trying to hang his hat on a provision in the law regarding the legal disclosure of trade secrets, which does not apply in this particular proceeding.

Mr. Boyle: My interpretation of the law is whatever it is. My further understanding is——

Exam. Peterson: Yes, it is up to you, if you want to prove your case.

Mr. Boyle: In many of these cases here, the only purpose in examining the bills on the part of a competitor truck line, in some instances, is to get a line on where the business is and go right out and try to get some of it.

Mr. Moore: Suppose we do?

[fol. 137] Mr. Boyle: I do not want to violate the law.

Mr. Van Osdel: It is just a smoke screen here. He has got a case to prove. Is he going to put in the evidence or isn't he?

Mr. Mattimore: We have objected to the evidence. There is a situation before the Examiner, whether he will admit the exhibits without the supporting evidence.

Exam. Peterson: I don't think the statements themselves will mean anything to the Commission, even if I accept them. The Commission would not consider that proof. The Commission has, in several cases, stated that if there is a protest in connection with any movement or alleged movement, they should have documentary evidence there, or have some one who can testify with respect to the actual operation. Mr. Noble is not in a position to testify with respect to any particular movement. He had several trucks that moved. He did not operate all of the trucks himself, even if he did operate one. So it would not be any proof.

The Witness: I am not a truckdriver.

Exam. Peterson: Off the record.

(Discussion off the record.)

Exam. Peterson: On the record. We will have a five-minute recess.

(A recess was had.)

Mr. Boyle: Mr. Examiner, I should like the record to show [fol. 138] that we have had an off-the-record discussion, and due to the fact that our records are now largely all trip, and there is information in there, trip information in the way of wage expense, and other items of cost, which I am sure these gentlemen are not interested in, we are trying to arrive at a way of separating the wheat from the chaff and giving them what they want. We are willing to give them from our records the information with respect to any of the shipments, points or territory, and within any of the periods about which they may inquire.

The Witness: We can go even further, from the period of October, we can give them these, our files here, and let them play with them all they want.

By Mr. Boyle:

Q. What are they?

A. They are bills of lading from November, November 1934, to October 15th, 1935. In other words, this stuff is all bound. They are bound differently. These records are merely for continuous operation.

Mr. Van Osdel: You are now talking about bills of lading. This data that you are going to furnish us on our request is not bills of lading; it is shippers' receipts.

The Witness: We are furnishing bills of lading with the receipt for the merchandise on this list.

By Mr. Van Osdel:

Q. There are signatures there by the receivers of the freight?

[fol. 139] A. Yes.

Q. And the information which we asked to be produced by lunch time, in regard to prior dates, you are talking now about the same thing, will exist?

A. No, the evidence we have is the truck receipt.

Mr. Van Osdel: Fine.

By Mr. Boyle:

Q. As I understand it, we have apparently for the period of November 17th, 1934, to October 15th, or some such date, 1935, data in different shape, that is, in practically chronological form?

A. These are all in chronological order going out.

Q. So it would be more simple for any of those to be looked up from that. For the period after October, 1935, up to date, the data is in proper form, subject to the confusion that I just suggested about other data in there. We will get from that such information with respect to particular shipments as you will indicate?

Mr. Van Osdel: Do I understand, counsel, what we might term grandfather proof before July 1st, 1935, is in such shape so we can examine it ourselves?

Exam. Peterson: Yes.

Mr. Van Osdel: We will just have this during the lunch hour, we will take care of that.

Mr. Edell: That is, both July 1st, and October 15th.

Mr. Van Osdel: That is fine.

[fol. 140] Mr. Boyle: Mr. Examiner, we have here and tender for the inspection of any of the interested parties, the original file and basic data from which the exhibits were compiled, the period from November 17th, 1934, to October 15th, 1935. The packages are separated, November '34 to July '35 in one, and July '35 to October, '35, in another. That is on inbound, and constitutes two packages.

Exam. Peterson: Inbound from where?

Mr. Boyle: Inbound generally into the Twin Cities from various places. A similar two packages of what we term outbound, are packages comprising all of the data for that entire period. We tender them.

Mr. Van Osdel: Over the entire operation, cover all the operation?

The Witness: These bills are identical with the listings made for the exhibits 5 and 6. In other words, this is the information from where the exhibit has been prepared.

Mr. Moore: Are they in the same order?

Mr. Boyle: They are here in chronological order.

Mr. Moore: Off the record.

(Discussion outside the record.)

Mr. Boyle: We tender this, Mr. Examiner for the purposes stated.

Exam. Peterson: We will adjourn until 2:00 o'clock.

(At 12:30 p. m., adjourned until 2:00 o'clock p. m.)

[fol. 141] Afternoon Session. 2:00 p. m.

Exam. Peterson: Gentlemen, let us come to order. Just before we proceed with the cross-examination, there are a few questions I would like to ask in order to clarify the application, to see just what you are claiming in connection with exhibit No. 2.

Mr. Boyle: Off the record.

(Discussion outside the record.)

Mr. Boyle: We are back on the record, Mr. Examiner?

Exam. Peterson: Yes.

Mr. Boyle: I have to ask the indulgence of the Commission and opposing counsel, for the interruption of Mr. Noble's testimony at this point, in order that I may put on a couple of witnesses from out of town, whose testimony will be very brief. They want to get away on an early afternoon train.

Mr. Moore: I don't believe that is fair. We have just gone over these exhibits, some of the bills, and we ought to be able to ask each of these, we ought to be able to find out from Mr. Noble first if he really did haul these shipments at all. And then, we ought to be able to corroborate that

one way or the other with succeeding witnesses. I am concerned principally about the Swift witnesses. These are Swift witnesses from out of town. I will insist that they come on after we are through with Mr. Noble, because I can't cross-examine intelligently that way.

[fol. 142] Mr. Boyle: The gentleman's insistance notwithstanding, I ask the indulgence and the courtesy accorded in the ordinary procedure. I have never heard of it being objected to at any time. It will take probably forty-five minutes at which time Mr. Noble will be back on the stand and be cross-examined to their heart's content.

Mr. Moore: It is not professional courtesy.

Mr. Boyle: Just a minute.

Exam. Peterson: Will you please state on the record just what these witnesses wish to testify to, with respect to what?

Mr. Moore: That may clear it.

Mr. Boyle: They are customers who have actually received and are receiving Noble service; they will testify with respect to the service.

Mr. Van Osdel: As to the grandfather date?

Mr. Boyle: One, yes. The others not.

Mr. Moore: You mean, whether it is satisfactory or not?

Mr. Boyle: Yes.

Mr. Moore: That is clearly immaterial.

Mr. Boyle: That is for the Commission to say.

Exam. Peterson: By the way, I was wondering why you distinguish between July 1, and prior thereto, and July 1 and October 15th, 1935?

Mr. Boyle: July to October was not my particular selec-
[fol. 143] tion. In a number of commissions' decisions, they have gone up to October 15th, considering their operation there after October 15th manifestly,—in fact, after July 1, manifestly would have nothing to do with the grandfather application.

Exam. Peterson: There are no grandfather rights whatever between July 1 and October 15th.

Mr. Boyle: That is correct.

Exam. Peterson: The Commission has never understood they can prove grandfather rights between July 1 and October 15th.

Mr. Boyle: Yes, I am not limiting this case to grandfather rights.

Mr. Moore: We are, however.

Mr. Boyle: That is your affair.

Exam. Peterson: You are attempting to prove convenience and necessity.

Mr. Boyle: Yes.

Mr. Van Osdel: Then, Examiner Peterson, I would insist that that part of the applicant's case wait until we have gone over this grandfather portion of it.

Mr. Boyle: The applicant's case is all so interwoven. I have three witnesses from out of town, whose testimony will take no more than ten minutes apiece, and I asked the privilege of putting them on at this time. I am not able to get them all unless I have them on this afternoon. One [fol. 144] has to leave at three o'clock.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: Back on the record.

Mr. Boyle: May the record show there was a discussion off the record, and that we resume here so as to preserve some continuity, and that the applicant's case here we consider is wholly covered under the grandfather clause by the pending application. However, without waiving any rights given by the law under that section of the Act, it should be our purpose to offer, not as an alternative, if you please, but as concerning or sort of a second count, testimony to the effect that the operation insofar as it differs as to specific points served, or as to service after July 1, 1935, while covered, in our opinion under the grandfather clause and while being no extension of the operation within the meaning of the law, that if it should be so found, then we offer the testimony at this time to show the fitness of the applicant, the reliability and dependability of the service, the fact it is required and desired; in other words, conforming to such testimony as might be briefly offered to show the convenience and necessity of it.

Exam. Peterson: Have the protestants any answer to make?

Mr. Edell: On behalf of Service Transfer Storage Company, Examiner Peterson, I would like to object to the [fol. 145] introduction of any testimony relating to either consistency with public interest, or convenience and necessity, as the case may be, on the ground that there is such a vast difference between a grandfather application, and a new application, or an application for new service, and the

attempt to inject this testimony at this time without the proper filing of a new application and notice served on interested carriers has taken the objectors by surprise. We are not able to, at this time, and not prepared to try a convenience and necessity case.

Exam. Peterson: Any other statements?

Mr. Van Osdel: In behalf of those I represent, I join with Mr. Edell in voicing his objection, and I also want to make the objection I made a little while ago, that even if counsel for the applicant, if his position is correct, that this proceeding, at this stage of the proceeding is inopportune at this time to start in on that. I am not admitting for one minute his contention is correct. It seems to me just as an orderly procedure here, I should insist that we proceed first with the grandfather part of the application.

Mr. Boyle: Then, your objection goes to the procedure rather than the character of the testimony.

Mr. Van Osdel: As you were saying a minute ago, that is my number two.

Mr. Boyle: The order of procedure?

[fol. 146] Exam. Peterson: Mr. Van Osdel, do you agree that this application is a proper application for convenience and necessity?

Mr. Van Osdel: I definitely said "No", and made it very clear, but at the same time the point I started to urge quite awhile ago, that we should certainly keep in line with a correct procedure here. We have been conducting an examination here during the noon hour. I want to proceed with this. I object to the testimony on the same grounds that the others have urged here, preceding me, and principally that the Commission has no jurisdiction to consider an application for public convenience and necessity, for the reason that notice has not been served, and for many other reasons.

Exam. Peterson: And the protestants have not witnesses here to support it.

Mr. Van Osdel: We are not prepared to contest that issue.

Exam. Peterson: The objection will be sustained. The applicant may introduce any witnesses he has here now with respect to continuity, or grandfather operation.

Mr. Boyle: I respectfully except to the ruling of the Examiner. At this point, I make formal offer of proof of

a witness, Fred Herbrand, Beaver Dam, Wisconsin; Max Wycisk, Plattville, Wisconsin; David Lila, Plover, Wis-
[fol. 147] consin. These witnesses are here present in the room, and if permitted to testify, would testify that they are engaged in the retail business at the points stated; that they receive the major portion of their supplies from Swift & Company out of Minneapolis, or St. Paul; that those supplies consist of the various fresh and cured meat products, cheese, poultry, eggs and sundry items in the regular packing house list. They would testify, the witness Herbrand, as to the service prior to July 1, 1935, and subsequent; as to the other two witnesses who were receiving no direct deliveries from Noble Transit Company prior to July 1, they will testify that the service subsequently rendered by Noble was more satisfactory, was quicker, the products arrived in better condition, and it was superior to the service previously received, either by rail or by truck, and that they are very anxious that that service be continued. It is highly important in their business. I make that as an offer of proof, if you please.

Mr. Moore: To that offer, I renew the objections previously made, which already appear of record; namely: the Commission has no jurisdiction to consider public convenience and necessity, because of the lack of proper notice, and for many other reasons.

Exam. Peterson: You have one witness here to testify with respect to operations prior to July 1, 1935. You may put him on.

[fol. 148] Mr. Boyle: All right, sir. I will call Mr. Herbrand.

FRED HERBRAND, was sworn and testified as follows:

Direct examination.

By Mr. Boyle:

Q. Your name and address?
A. Fred Herbrand.
Q. Where do you live, Mr. Herbrand?
A. At Beaver Dam, Wisconsin.
Q. How long have you lived there?
A. Since 1912.
Q. What business are you engaged in?
A. Meat game.

Q. Where do you purchase your principal meat and packing house supplies?

A. Where do I what?

Q. Where do you purchase them from?

A. From Swift & Company, Armour & Company.

Q. Swift & Company and Armour & Company?

A. Swift & Company and Armour & Company.

Q. With respect to the Swift purchases, are those shipments made to you by Swift & Company out of Minneapolis or St. Paul?

A. Out of St. Paul.

Q. Some years ago, Mr. Herbrand, during the days of the so-called car routes, you received your shipments over the refrigerator car routes by rail?

[fol. 149] A. Yes, we did.

Q. Can you recall about when that was discontinued?

A. It was discontinued, and it was continued again, and it was discontinued. I think the first time it was discontinued probably was around ten years ago, probably longer than that.

Q. How long have you been getting your product from Swift by trucks?

A. Well, I should imagine around three or four years, direct.

Q. The Noble Transit Line delivers these products at the present time to your plant?

A. Yes, sir.

Q. To your establishment, do they not?

A. They do.

Q. Do you know about when they started?

A. Just—I am not sure. When were they started?

Q. When, yes.

A. I couldn't say just exactly, I imagine around three to four years ago.

Q. The rest of the record will connect up Beaver Dam with prior to July 1, 1935.

Mr. Fiddes: Did the witness understand that you asked when Noble started to serve him?

Mr. Boyle: Yes. When Noble started to serve him. The rest of the record connects up and shows that was prior to [fol. 150] July 1.

By Mr. Boyle:

Q. What has been the character of the service that you received in the transportation of your commodities from St. Paul to Beaver Dam, from Swift & Company by the Noble Transit Line as compared with the service you received for the transportation of the same commodities before Noble handled it?

Mr. Fiddes: The objection is, the question is not within the issues of the case. Public convenience and necessity are not the issue here. I understood he was to be put on the stand to testify to the fact of operations on the grandfather date.

Examiner Peterson: Subsequently.

Mr. Boyle: You have got to show the continuance of operation.

Mr. Fiddes: Not to the needs of the service.

Exam. Peterson: Objection sustained.

Mr. Boyle: Exception, if you please.

Exam. Peterson: The exception will be noted, of course.

By Mr. Boyle:

Q. The Noble Company, I believe you said, is still delivering down there to you?

A. Yes, sir.

Q. Are you satisfied with the service?

A. Yes.

[fol. 151] Mr. Fiddes: Just a minute. The same objection.

Exam. Peterson: Objection sustained.

Mr. Boyle: The same exception, if you please.

Exam. Peterson: Yes.

By Mr. Boyle:

Q. Do you consider the Noble Transit Company, the petitioner here, fit and efficient to perform this service in your territory?

Mr. Fiddes: Just a moment, Mr. Boyle. Incidentally, counsel seems trying to bring out the questions of what he has already offered to prove and what the Examiner has ruled to be immaterial.

Exam. Peterson: Just for the purpose of his grandfather operation and continuity, not with respect to convenience and necessity, or related to it.

Mr. Boyle: Just note a general exception to the Examiner's ruling. We will stop there.

Exam. Peterson: Yes.

Mr. Boyle: This grandfather period to which they refer, Mr. Herbrand, I think I may tell you, is a period on and prior to July 1, 1935.

By Mr. Boyle:

Q. Was the service you were receiving from Noble satisfactory during that period?

[fol. 152] Mr. Fiddes: The same objection to the question; it is immaterial as to whether the service is satisfactory. The whole question in this case is whether it was performed.

Exam. Peterson: Objection sustained.

By Mr. Boyle:

Q. You were receiving the service from Noble & Company at that time?

A. Yes.

Mr. Boyle: Mr. Examiner, it will be useless, then, to proceed with these other witnesses, in view of the ruling. I have made the formal tender of proof. I think the record shows I have excepted to the ruling.

Exam. Peterson: Is that all you propose to develop in so far as the grandfather applications are concerned, with this witness?

Mr. Boyle: That is all, that is all I can develop with this witness, under the ruling. I may not recognize the distinction between the grandfather period and after. Now, that will be all.

Mr. Fiddes: No cross examination.

Mr. Edell: No cross examination.

(Witness excused.)

COLLOQUY

Mr. Boyle: Just a minute. There is another witness whose name I have.

Exam. Peterson: Now, Mr. Boyle, I want it clearly understood if you have any other witnesses that are ready to [fol. 153] testify with respect to any operations on July 1 and prior thereto, and continuously since then, you may put them on.

Mr. Boyle: I have quite a number, but I won't because of the fact that they are small merchants and came up here at considerable sacrifice to their own business. We are not reasonable to ask them to stay here any longer. So I have to let them go back. I shall have other witnesses, however.

Exam. Peterson: Yes. I do not want the record to indicate that the Examiner precluded any evidence with respect to any operations on July 1, 1935, and prior thereto and continuously since then by any witness that you may have.

Mr. Boyle: Yes, but you do not want any testimony as to the——

Exam. Peterson: Convenience and necessity.

Mr. Boyle: —quality of the service and its satisfactory rendition.

Exam. Peterson: Not with respect to convenience and necessity.

Mr. Boyle: I do not see how we can separate them.

Exam. Peterson: Convenience and necessity has to be shown in connection with new operations, but in grandfather applications it is immaterial whether he is financially able, as long as he has operated bona fide in accordance with the state law. You are familiar with the Slagel case?

Mr. Boyle: I am familiar with quite a few authorities. [fol. 154] I would like to add, if the Examiner please, to the list of witnesses. May I enumerate Mr. Corbin of Pittsville, Wisconsin.

Mr. Moore: Is he in the room?

Mr. Boyle: The witness Vogels, of Green Bay, Wisconsin, whom I will not have here until tomorrow morning, but who will be available tomorrow morning, but whom I do not want to bring all the way up here and be met with the same objection. Their testimony would be similar to the testimony of the others that I have enumerated, and will come within the same offer of proof.

Exam. Peterson: With respect to operations that were commenced between July 1, 1935, and October 15, 1935, if there were not any objections by protestants I would agree to let your convenience and necessity witnesses come on

here, but there is an objection by protestants. Whenever there is an objection by protestants in a case like this, where it is a BMC 1 application, it might be considered as covering operations between July 1 and October 15, 1935, if there weren't any protestants or objections to it. I think there have been some decisions, something like that, at least the Commission has given the applicant thirty days in which to file another application covering that period; but you are not seeking such authority. You are not seeking the right to file another application covering any movement between July 1 and October 15, 1935.

Mr. Boyle: No. For the reason, if I may say, Mr. Exam- [fol. 155] iner, I don't think it necessary. I think at present the application amply covers everything that I am offering to prove.

Exam. Peterson: That you have not with you, and you are not familiar with any case which supports your contention?

Mr. Boyle: Yes, I have.

Exam. Peterson: Let me see the case.

Mr. Boyle: I have a great many of them.

Mr. Moore: May we have the citation, please, the name of it?

Exam. Peterson: July 5th, 1925, Runzie Spear contract carrier application.

Mr. Moore: The date, please?

Exam. Peterson: 7 MC. I. C. C. 525, decided May 25th, 1938. This is off the record.

(Discussion outside the record.)

Exam. Peterson: Show on the record reference to page 527. Mr. Boyle also refers to No. MC 2970.

Mr. Van Osdel: 2970. That is the docket number of the Spear case.

Exam. Peterson: MC 60766, a contract carrier application, 2 MC 523, decided July 28, 1937. Off the record.

(Discussion outside the record.)

Mr. Moore: Emphasis is laid on the notice there.

Mr. Boyle: The last decision that the Examiner referred to is one by Division 5, where they state their conclusions [fol. 156] differed from the recommendation of the Board, although the decision is really that of the Board itself.

Exam. Peterson: What is the page number, the last case that you referred to?

Mr. Boyle: Page 525.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: What have the protestants to say with respect to those decisions applying in connection with this operation?

Mr. Moore: The fact is, the situation in this case differed considerably from what we have here. In the first place, we do not have here a public convenience and necessity question at all. It is a matter of consistency with the public interest, to begin with. In those cases, Gardner, particularly, and also the others, were cases where proof of the continuance of the service was held to be evidence of public convenience and necessity, being common carrier cases, and the question of fitness, and so forth, otherwise shows from the record without objection from anybody. Emphasis in the Gardner case, at least the West Virginia case, was laid particularly on notice; because under the law and the rules, if you are going to prove a new operation, there are certain parties interested in that situation that are not or in any event might not be interested in the grand- [fol. 157.] father clause operation. For example, commercial clubs and traffic interests of various cities that were interested in the new operation. Therefore, notices under the law and the rules of the Commission should have gone out to persons who were directly or indirectly competitive with the application under BMC 8. None of that was done here. We are coming up on a grandfather clause application, as he says, for a contract carrier's permit. That is all there is here. And in none of the cases which have been cited,—I will take that back. I guess there was one where there was a contract carrier contract. I consider the facts situation here different, as near as I can tell. That is one of the difficulties of offering this testimony now. We do not know precisely what we are up against until we get through with Mr. Noble.

Mr. Van Osdel: Mr. Examiner, I would like to record this, that in connection with the cases in comparison there, the so-called BMC 8 application, as provided by the Bureau of Motor Carriers, that is under operations and extension

of operations, and also what we now know to be intermediate operations, when an applicant started after June or July 1st and up to October 15th, 1935. Now, it has been the practice of the Commission, whether they were wrong or right, in demanding that nobody even continue intermediate operations without filing a BMC 8 application, let alone have a notice of hearing the same when it comes up for hearing. Operations must of necessity not continue [fol. 158] until such time as a BMC 8 has been filed, if the applicant has claimed intermediate rights up to October 15th, or new rights.

Exam. Peterson: Then assuming that the witnesses that are here now would, testify that applicant's services have been very satisfactory; it is continued willingly, and so forth, there might be.

Mr. Boyle: The services are better now than they were before he got in control.

Exam. Peterson: Protestants might have witnesses additional just to the contrary, and the Commission certainly wouldn't give a certificate of convenience and necessity on a showing of one witness from one town, when there might be a lot of other witnesses that never knew anything about him, or hear anything, in connection with convenience and necessity. It certainly would be manifestly unfair to them.

Mr. Boyle: Understand, Mr. Examiner, that my position is that the application that has been filed by Noble is sufficiently broad, complete and full, that these gentlemen or any other competitors may have notice of anything germane that may come up. This is germane. They are not taken by surprise.

Exam. Peterson: Mr. Boyle, will you refer to a single place in the application which puts the protestants on notice that you might have a convenience and necessity witness at this hearing?

[fol. 159] Mr. Boyle: No, nothing about convenience and necessity. It states the operation there that he is performing so very broad that in the first place it includes all of the points that he may not have been serving directly at the time in the territorial application.

Mr. Fiddes: I suggest this also, Mr. Peterson——

Exam. Peterson: At the top of the form it says "This form for use only by common carriers engaged in the transportation of property, interstate or foreign commerce, on

June 1, 1935, by a contract carrier so engaged on July 1, 1935, and continuously thereafter".

Mr. Boyle: He was so engaged.

Exam. Peterson: You propose to put in witnesses here who will testify about something not really covered by this particular application.

Mr. Boyle: That probably is the point upon which we are not in agreement. My theory of the application is that it is sufficiently broad that that shall put opponents on notice or protestants on notice of any testimony of this character that might come up.

Exam. Peterson: Are you in a position to state whether or not applicant has been before the Commission and informally indicated in any way whatsoever that they rely on convenience and necessity? This case has been before the district director.

Mr. Boyle: That I am not, but if I were to suggest anything to the applicant when he was in the informal discussion, he would reserve all rights he might have.

[fol. 160]

Exam. Peterson: But as far as you know he never did?

Mr. Boyle: I couldn't answer that. I really do not know what he did prior to two weeks ago.

Mr. Fiddes: As a matter of fact, I think Mr. Boyle made the statement before he made that offer of proof, in his own feeling, their grandfather proof is sufficient to establish their rights.

Mr. Boyle: That is correct.

Mr. Fiddes: In those cases, at least, it was evident that they needed public convenience and necessity material in the sense it was not sought to be gained through grandfather rules.

Mr. Boyle: They were right.

Mr. Fiddes: Furthermore, on the evidence, if it was admissible it would be only if it were established that operations had been commenced prior to October 15th, and after July 1st, but offering this evidence at this stage of the case, prior to even cross examination of the first witness that is offered, could hardly be stated that operations have been established as yet in this case prior to October 15th.

Exam. Peterson: This application was filed February 10th, 1936. That is not similar to a so-called grandfather operation where the applicant failed to file an application [fol. 161] on the proper date, but filed one later on.

Mr. Boyle: Application was filed in time.

Exam. Peterson: There is nothing, as the Examiner sees it, nothing to indicate any convenience and necessity involved.

Mr. Slattery: Certainly, if there had been any indication that convenience and necessity was involved in the case at all, the competing transportation interests would at the very minimum wish to show the transportation existing in the region. For example, the rail carriers would wish to show their services. That would be quite a large order. If it is something that we are not at all prepared to meet upon that notice as agreed now, that is different.

Exam. Peterson: You don't have to present that kind of witnesses here.

Mr. Slattery: Certainly not.

Mr. Fiddes: That understanding is true of motor carriers that appeared by counsel without any personal notice.

Exam. Peterson: Mr. Boyle, do you have any further evidence with respect to grandfather rights in connection with these witnesses?

Mr. Boyle: Not these witnesses, no.

Exam. Peterson: Very well, then.

Mr. Boyle: I think the record is full with the offering of proof, the discussion of objections, the rulings of the Examiner, and my exception to the rulings in chief and the [fol. 162] several collateral rulings, and with all due respect to the Examiner, we will let the record rest with that.

Exam. Peterson: Are you in a position to show how many shippers there are in these particular towns? You don't know anything about that, do you?

Mr. Boyle: No, I would not know that.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: Make your statement again on the record.

Mr. Boyle: They would not testify to any movement except to their points in Wisconsin.

Mr. Van Osdel: That is what I thought.

Mr. Boyle: It would not involve any movement of the character you are talking about.

Mr. Van Osdel: Not interested in North Dakota?

Mr. Boyle: Somebody might have sent a ham back to Swift some time, but not the character of movement you say.

Mr. Van Osdel: I will define it a little more clearly. Those three witnesses from Wisconsin in no sense of the word would have testified concerning this application about anything regarding the movement west of the Twin Cities in Minnesota and points in North Dakota.

Mr. Boyle: West of the Twin Cities and North Dakota.

Mr. Van Osdel: Yes.

Mr. Boyle: That is correct.

[fol. 163] Exam. Peterson: Off the record.

(Discussion outside the record.)

Mr. Fiddes: That is all.

Exam. Peterson: Well, have the protestants anything further?

Mr. Moore: So far as we are concerned, we will stand upon our original objections, in view of the present condition of the record, and at this stage of the proceedings. In other words, we do not know yet what is ahead of us, whether we could consistently and wisely waive this objection, that comes back to the order of procedure.

Exam. Peterson: Very well. Anything further, Mr. Boyle?

Mr. Boyle: Nothing from me. I am through.

Exam. Peterson: Very well.

Mr. Boyle: That is on that point.

Exam. Peterson: Your next grandfather witness.

Mr. Boyle: I will have Mr. Noble resume the stand for his cross-examination.

Exam. Peterson: Very well.

Mr. Van Osdel: It was my understanding counsel for the applicant has offered those exhibits, so I should like to ask some questions of Mr. Noble for the purpose of laying an objection to the introduction of those exhibits.

Exam. Peterson: Yes.

Mr. Boyle: Mr. Noble, will you resume the stand?

[fol. 164] Exam. Peterson: By the way, I want to make it clear, the witnesses that you proposed to submit, were they in connection with operations between October 1, 1935, and July 1, 1935, or after October 15, 1935?

Mr. Boyle: Between July and October.

Exam. Peterson: Yes, July 1st and October 15th?

Mr. Boyle: Oh, yes. Witness Herbrand would be.

Exam. Peterson: He has already testified?

Mr. Boyle: That the witness from Plover, the operation so far as Noble is concerned, did not start until early in 1936. Wyziak and Lila, Plattville, and Plover, are the two points. The operation was certainly after January 1, 1936, anyhow.

Exam. Peterson: I thank you. The ruling stands.

Mr. Boyle: That is as far as Noble is concerned.

Mr. Van Osdel: Let the record show I want to ask some questions of Mr. Noble concerning Exhibit No. 5 for the purpose of laying an objection to the exhibit.

Exam. Peterson: Mr. Van Osdel.

Mr. Boyle: Did the Examiner have a question he wanted to ask?

Exam. Peterson: Yes, with respect to this map.

Mr. Boyle: I think we can all agree on that.

Exam. Peterson: Surely. We have got a long statement in the application which is really not evidence, but it de- [fol. 165] scribes the operation to some extent and shows certain routes, for example in Iowa, the northern part of Iowa, and the northern part of Illinois. Now, this map, Exhibit No. 2, does not show that, for example, the line from Sioux City through Iowa Falls, from Waterloo to the Mississippi River; what are those highways? Just take the stand, Mr. Noble.

JOHN F. NOBLE, previously sworn, resumed the stand and testified as follows:

By Exam. Peterson:

Q. What are those highways?

A. The map indicates as far as the C letter.

Q. What are the highways?

A. The highways are mentioned in the application. The highways mentioned on the map are U. S. Highways. The highways there have no particular bearing on the operation. The highways that we insist that we have traveled on are listed in the appendix to the original application.

Q. What is the southern boundary of the Iowa operation?

A. I think it is U. S. Highway 61.

Q. You better be sure. There is the application.

A. These routes have all been checked by me. I would say——

By Mr. Boyle:

Q. When you say these, you are referring to routes that are specifically set out as fully answered in the application to the question, and is that a sheet headed A-II, in Roman numerals, A-I?

A. That is correct.

[fol. 166] Q. Is that correct?

A. Yes, sir. This is Exhibit A-2-A-1, and has been prepared for me from statements of truck drivers making the territory. This is the information that was given me at the time the application was made.

By Exam. Peterson:

Q. What is the northern boundary or southern boundary of the Iowa operations?

A. It would appear that would be U. S. 20, Independence, State Highway 11 to Cedar Rapids, and U. S. Highway 30 to Chicago.

By Mr. Boyle:

Q. Is that the southern boundary?

A. Yes.

By Exam. Peterson:

Q. The southern boundary in Illinois?

A. That would be U. S. Highway 30.

Q. What is the northern boundary in Minnesota?

A. We claim no northern boundary in Minnesota.

Q. What is the most northern point that you serve?

A. Grand Forks, North Dakota; then a little town is across from Grand Forks, about Woody, Minnesota.

Q. Before July 1, 1935?

A. Yes, sir. We don't attempt to show part of that operation.

Q. You don't attempt to show part of that operation to Woody?

A. No, sir. Isn't there a town this side of Grand Forks, East Grand Forks, which I would say would be the northern boundary.

Q. How about Bemidji?

[fol. 167] A. Bemidji is intermediate. Bemidji is intermediate from East Grand Forks.

Q. From Duluth?

A. Our contention is we have traveled on any and every highway that was necessary to get to the destination involved.

Q. That was necessary. What highway did you travel on, not what was necessary. The Commission would like to have the actual operation. What is the northernmost boundary or northernmost route that you actually operated on?

A. U. S. 2 to Grand Forks. That runs to East Grand Forks, down as far as Erskine and over to Bemidji, to Duluth. Our exhibit shows we have had an operation of that nature to Duluth. We probably traveled on that road.

Q. But U. S. 2 does return from Grand Forks to Duluth?

A. Yes.

Q. East Grand Forks?

A. Yes, sir.

Q. And you claim you have operated all over the territory south of U. S. Highway 2?

A. It would be our contention that we were operating wherever the road was convenienet to our destination. This is merely a partial list of the routes on which we have actually traveled.

Q. The Commission would like to know just what the points are, what are the outermost points. For example, as long as you admit you do not operate north of U. S. [fol. 168] Highway 2, the Commission necessarily would not give you the entire State of Minnesota. When you do not operate north of U. S. 2, you cannot claim that, can you?

A. I am not in a position to know what I am entitled to. I know what I believe is my right. That is what the hearing is for.

Q. What is the northern boundary of your operation in Wisconsin?

A. Our operation has gone as far as Niagara, Wisconsin. I would not be in a position to tell you which road they took to get there.

Q. On July 1, 1935?

A. Not on July 1.

Q. We are talking about on July 1, 1935 and prior thereto.

Mr. Fiddes: I wonder if I might inquire whether the purpose of this is to determine what the applicant claims with respect to the outermost boundaries of what the appli-

cant was doing? There is some difference if this is to be taken as proof of operations; or if it is what they are claiming.

Exam. Peterson: What he is claiming they did do. Of course, he is supposed to support that with documentary evidence.

Mr. Fiddes: That is true.

Exam. Peterson: My understanding is that he is not claiming the entire State of Minnesota.

[fol 169] Mr. Fiddes: That is right.

The Witness: Well, we have traveled the northernmost road in Wisconsin; that we can probably show we have traveled U. S. Highway 8. There is to be one in the north and south line, U. S. Highway 53 up to Rice Lake.

By Exam. Peterson:

Q. On or before?

A. Prior to July 1st, 1935, and continuously thereafter, that is, prior to July 1st, not necessarily on the date of July 1st, in that period.

Q. In June?

A. Yes.

Q. Well, now, on and prior to July 1, 1935, do you claim that you operated south of those lines, those highways in Wisconsin, or what is your most easterly route in Wisconsin?

A. I would say that was 141.

By Mr. Boyle:

Q. Is there any fixity to your routes?

A. There is no fixity at all. We go right to the Lake, Lake Michigan, Manitowoc, Milwaukee, Racine and Kenosha. That would be right alongside of the lake.

By Exam. Peterson:

Q. Well, south of Milwaukee you did, according to your Exhibit No. 2, but north of Milwaukee you did not serve any points prior to July 1, 1935, did you?

A. On the way from Wisconsin Rapids to Milwaukee we probably went down through Fond du Lac, cutting over Route 141 to 42. Our trucks were operated on highways which are the most convenient to get to the destination [fol. 170] involved.

Exam. Peterson: Protestants may cross-examine.

Cross-examination:

By Mr. Van Osdel:

Q. Just a minute, Mr. Noble. Relative to that matter, Examiner Peterson, which you have just been going over, I intend certainly at some later time in the hearing to ascertain what this man's claims are. At the present time I am going to confine my examination to the admissibility of the exhibit known as Exhibit No. 5. I understand that is where we are, is it not?

Exam. Peterson: Very well.

By Mr. Van Osdel:

Q. Mr. Noble, you have submitted for examination to protestants what appears to be the original record from which Exhibit No. 5 was taken; is that correct?

A. These records are the records we have in our files as of that particular time.

Q. As is covered in Exhibit No. 5?

A. Yes, sir.

Q. Now, then, I call your attention to those records, and I wish that you would look at them there and find the shipment from Chicago, Illinois, to Minneapolis, of cotton bags on January 7, 1935. Do you see that?

A. Yes, sir.

Q. Now, that shipment was from Chicago to Minneapolis, apparently, is that right?

[fol. 171] A. That is correct.

Q. I notice down at the bottom there is a receipt that says "Swift & Company, B. C.," I presume that is the receipt of it here?

A. It would indicate that, yes.

Q. Would that mean that somebody with the initials B. C., I presume, signed for Swift & Company?

A. That I can't answer. I would imagine so.

Mr. Moore: Destined for where?

By Mr. Osdel:

Q. Destined for Minneapolis?

A. Yes.

Q. At any rate, it must have been somebody in Minneapolis of Swift & Company that signed it?

A. That is probably it.

Q. It is not only probable, it couldn't be anything else, could it, Mr. Noble?

A. It would appear that.

Q. I am just trying to ascertain what the signatures are. I notice there is another shipment on January 9th, 1935, from Chicago to South St. Paul. It was of certain soap by your truck line; it went by your truck line, did it not?

A. Yes, sir.

Q. I notice there is some signature of Swift & Company with the initials B. C.

A. That is correct.

[fol. 172] Q. So again it must be the same party who has acknowledged receipt of the merchandise at the Twin Cities of Swift & Company?

A. Yes. I would imagine so.

Q. His initials would be B. C.?

A. Yes.

Q. I want you to turn to a shipment of January 7th, 1935; I have it marked there, January 7th, just a little paper for your convenience, January 7th, and ask you what that shipment is?

A. That would be—would appear to be a shipment, dried kale stencil ink.

Exam. Peterson: There are several shipments on January 7th, 1935.

Mr. Van Osdel: I am interested in Minnesota. May I go to the point of Detroit Lakes, Minnesota.

Exam. Peterson: You better show on the record the destination.

Mr. Van Osdel: I am asking him what the shipment is.

Exam. Peterson: Yes, January 7th, 1935.

Mr. Boyle: Tie it up with the page number.

Mr. Moore: He is giving him the document here and asking him what it is.

Mr. Van Osdel: The Examiner wants it another way.

By Mr. Van Osdel:

Q. Mr. Noble, I show you Exhibit No. 5, at the top of page [fol. 173] 8, January 7th, 1935, for Swift & Company there

appears to be a shipment from Chicago, Illinois, to Detroit Lakes, Minnesota, of stencil ink.

A. That is correct.

Q. I show you what purports to be the original record of January 7th, 1935, do you have that before you?

A. Yes.

Q. I notice it is stencil ink. It is 11 pounds.

A. Correct.

Q. Mr. Noble, where did you actually carry that, if your memory serves you right?

A. I would not be able to tell you. The bill shows Noble truck, Detroit Lakes, Minnesota, destination.

Q. Now, the rate, 35 cents, would that be from Chicago to Detroit Lakes?

A. That would not be the Detroit Lakes rate.

Q. No, that would be a rate from Chicago to the Twin Cities, would it not?

A. That is correct.

Q. You would not take eleven pounds of stencil ink all the way to Detroit Lakes, would you?

A. That might be an intrastate movement from South St. Paul to Detroit Lakes. It would be possible.

Q. Just answer, would you take eleven pounds?

A. Yes.

[fol. 174] Q. Without any other shipments?

A. No, sir.

Q. There is a 35 cent rate there, is there not?

A. That is correct.

Q. That was the current rate.

Q. Now, then, I show you the signature down here. It says Swift & Company, B. C.

A. That is correct.

Q. That must have been signed, then, by this man who signed the ones at Minneapolis, wasn't it?

A. It would appear that, yes.

Q. So, so far as the actual original records show, this is a movement from Chicago to Detroit Lakes, from Chicago to Minneapolis or South St. Paul or Twin Cities, and receipted for at that place?

A. I would not be prepared to say that B. C. is, it apparently is a shipment from Chicago to Detroit Lakes via Noble Truck, as indicated, and apparently left off at South St. Paul.

Q. So far as your observation is concerned, you took it from Chicago to South St. Paul; is that a fact?

A. It would appear so, yes, sir.

Q. Now, then, I call your attention to a shipment under date of the 25th of January, 1935, on page 8 of Exhibit 5, showing a shipment for Swift & Company from Chicago [fol. 175] to Detroit Lakes, of printed wrappers. Now, that purports to be a shipment from Chicago to Detroit Lakes, on page 8?

A. That is right.

Q. I show you the original record. That is January 25th, 1935?

A. That is correct.

Q. It is on a record of Swift & Company, is it not?

A. On a record of Swift & Company.

Q. What would you call this I have my hand on?

A. I would say it is a truck expense bill made out by Swift & Company in Chicago of January 1st, '35, where a shipment is over Noble truck.

Q. January 25th?

A. January 25th, 1935, shipment by Noble truck to Swift & Company's produce plant, Detroit Lakes, Minnesota.

Q. I notice there is only 39 pounds there; is that a fact?

A. That is right.

Q. And this rate is again 35 cents.

A. Yes.

Q. That is the rate between Chicago and the Twin Cities and South St. Paul?

A. You have so testified.

Q. Just,—I also want your testimony, Mr. Noble, relative to each one of these.

A. Yes.

Q. If you will just say yes or no.

[fol. 176] A. Yes.

Q. I show you a signature on that record. That is also Swift & Company with the initials B. C.?

A. Yes.

Q. That would signify that the receipt of that merchandise was received at South St. Paul by Swift & Company?

A. Minneapolis.

Q. Some place in the Twin Cities.

A. Wherever B. C. is located.

Q. You have already testified at the beginning that B. C., Swift & Company, B. C., signed, was Minneapolis, and

those St. Paul shipments that I showed you at the beginning of my examination.

A. It is possible they are left off at Minneapolis, and sometimes St. Paul.

Q. You don't know, whether it was South St. Paul or Minneapolis?

A. Yes.

Q. It is one or the other?

A. It would appear that from the rates, purely from the rate.

Q. Isn't it a fact in this case like the one you testified before from the original record, it appears that you hauled the merchandise from Chicago to the Twin Cities, but no further?

A. That I would not——

Q. From the record now, Mr. Noble?

A. From this particular record it is possible, yes.

[fol. 177] Q. Just to make everything clear. It is a fact that Exhibit No. 5 was prepared from the exhibits that you have in your hand and others?

A. Absolutely.

Q. Now, we will take another shipment. Turn over to page 9. We will take a Fargo shipment, 9 of Exhibit No. 5. That purports to be a shipment of January 25th, 1935, for Swift & Company from Chicago, Illinois, to Fargo, North Dakota, of cheese?

A. That is correct.

Q. That is what your Exhibit 5 shows the shipment is?

A. Yes.

Q. Now, look at the original record. How many pounds were involved in that shipment?

A. 29 pounds.

Q. 29 pounds?

A. Yes, sir.

Q. The rate was how much?

A. The rate is 35 cents.

Q. That still is the rate from Chicago to the Twin Cities?

A. It was.

Q. Who receipted for that particular shipment?

A. It would appear to be Swift & Company, B. C.

Q. It would be receipted for at the Twin Cities, would it not?

A. That is correct.

[fol. 178] Q. So that it appears from the original record from which Exhibit 5 was prepared, that this shipment did not move from Chicago to Fargo by your truck, but, rather, from Chicago to the Twin Cities?

A. We were the originating line, yes, sir.

Q. From the original record it appears that you carried it from Chicago to the Twin Cities; is that right?

A. That is right.

Q. I call your attention to page 11 of Exhibit No. 5, and show you a shipment of March 1st, 1935, from Chicago to Detroit Lakes, of stools. From Exhibit No. 5 it appears you hauled it from Chicago to Detroit Lakes, does it not?

A. That is correct.

Q. I show you the original record and ask you if it is a fact it was only just 60 pounds involved?

A. That is correct.

Q. And the rate again was 35 cents?

A. Yes, sir.

Q. It shows it was a shipment from Chicago to Detroit Lakes by your truck, that so far as your truck was concerned, you carried it from Chicago, Illinois, to the Twin Cities; is that not a fact?

A. It would appear so, yes, sir.

Q. The same receipt appears down at the bottom?

A. Yes.

[fol. 179] Mr. Van Osdel: At this time, Mr. Examiner, I have taken a few shipments from Exhibit No. 5 to show that they purport to be something that is not actually the fact. I am not going to go into the exhibit any further. There are some commodities, and when we get to them, we will take them up. At this time I want to register a very serious objection to the introduction of Exhibit No. 5. It purports there was certain transportation, when in reality and in fact they are not at all.

Mr. Moore: And the further ground there is no proper foundation laid.

Mr. Boyle: Does it go to the destination other than Fargo and Detroit Lakes?

Mr. Van Osdel: Yes. I have some other ones in there. I just want to cover enough to show that the objection was sound to the exhibit. As I said, Mr. Examiner, we will cover all of the shipments later, concerning my territory. I want to cover enough to show the exhibit does not state

the true facts. Does the Examiner want to know all of the shipments?

Exam. Peterson: Well, you mean, before I rule on it?

Mr. Van Osdel: Yes.

Exam. Peterson: No, not before I rule on it, I think.

Mr. Boyle: The mere fact that—let me ask Mr. Noble.

By Mr. Boyle:

Q. Who prepares that billing, Mr. Noble, from which you were reading?

A. This bill?

[fol. 180] Q. Yes.

A. This bill is prepared in Chicago.

Q. By Swift & Company?

A. By Swift & Company, yes, sir.

Q. It was customary for Swift & Company to show those destinations in that form?

A. They had two methods of showing the destination.

Q. That is what I want to get.

A. They had one method of billing it right straight through on Noble's truck, and of billing on Noble truck to South St. Paul, the items involved here with the one exception that showed Noble truck to South St. Paul, which is an error. The rest of them are correctly billed Noble truck to final destination.

Q. With respect to transportation of that character, what if any explanation have you to those particular shipments? Or, are there any shipments shown on this exhibit to Detroit Lakes or to Fargo that you handled to this other destination?

A. We handled those in connection with intrastate movements to Detroit Lakes, to Marshfield, to various point involved out of South St. Paul. At various times Swift would give us an intrastate movement for a truck that has come directly in from an interstate operation. Those items would be left on the truck, carried right straight through to final destination. While there may be some error in some of these items that actually they were left at South St. Paul, [fol. 181] the procedure was if there was an intrastate movement, to give us that intrastate movement and we would carry it on to the final destination.

Q. Some of these trucks would arrive in South St. Paul at night from Chicago and some of the stuff would be thrown off at night?

A. We would load it on in the morning and go out.

Q. You find that on your billing. You find it connected up with the billing?

A. No, it is an intrastate movement.

Q. It is possible some of those movements do so appear?

A. Yes.

Mr. Van Osdel: I can't hear you.

Mr. Boyle: We will move out intrastate by Noble Transit. The witness answered yes.

Mr. Van Osdel: On the ground we may answer, I am perfectly willing to continue. It is just covering a small part of Exhibit 5. I find a great deal more of the same thing I have covered in four questions.

By Mr. Boyle:

Q. Would it or would it not be a fact possibly as to those two particular points that counsel has referred to the same situation may have existed?

Mr. Moore: That is objected to as immaterial. We got to take the facts one by one.

Mr. Van Osdel: They have not even shown on the exhibit itself. The burden of showing it is worthy of consideration and certainly is thrown back upon this applicant.

[fol. 182] Mr. Boyle: What is the objection?

Exam. Peterson: You offered, Mr. Boyle, Exhibits 2 to 9, inclusive?

Mr. Boyle: Yes.

Exam. Peterson: And you made objection to number 5?

Mr. Van Osdel: It is our position that this situation that exists in a part of them, and I know it exists in a great number of them, it is reasonable that it exists in the whole thing. We certainly object to it.

Mr. Boyle: As to what, destination?

Mr. Van Osdel: Exhibit No. 5.

Mr. Boyle: Exhibit No. 5?

Exam. Peterson: He is going to go into that later on. I will receive the exhibits 2 to 9, they are received.

(Applicant's Exhibit 2 to 9, both inclusive, Witness Noble, were received in evidence.)

Mr. Moore: We will object to their reception in evidence at this time on the ground that no proper founda ion is laid.

Exam. Peterson: They have offered these freight bills and bills of lading for inspection here. Now, you can go into the cross examination.

Mr. Moore: Let the record show we have not completed our inspection of these yet, nor have we cross examined concerning every exhibit.

Exam. Peterson: What haven't you inspected? What [fol. 183] more do you want to inspect?

Mr. Moore: We have not had a chance yet to inquire about any of them, until Mr. Van Osdel is through.

Exam. Peterson: Weren't you here at noon?

Mr. Moore: Oh, yes, and he was busy with them at that time.

Exam. Peterson: No one stated on the record then or off the record that they wanted more time.

Mr. Van Osdel: Examiner Peterson, I say in sincerity to Mr. Moore I am sorry I monopolized them.

Mr. Moore: During the noon time there was not time for us to do it.

Mr. Van Osdel: We found absolute falsity in the exhibit. We certainly think under the circumstances it would not be admissible. When it reads he hauled from Chicago to Detroit Lakes, and it turned out he didn't do that.

Exam. Peterson: By admitting it in evidence does not mean that it is conclusive proof of those operations stated there.

Mr. Boyle: Let the record show we take exception to counsel's accusation that anything in the exhibit is a falsity. Errors may occur in the exhibit. We except to and resent any such imputation as falsity. I think it is not very courteous.

Mr. Van Osdel: I also resent the insidious aspersions that are cast at my remarks. I will proceed, Mr. Examiner, with the examination of Exhibit No. 1. I want to produce [fol. 184] every one of those errors if it is going into the record.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record. While the exhibits have been received in evidence, that does not preclude the

protestants from further examination of the documents that he has introduced or has presented for examination, and I think whatever time they need, let them say so. We will have a recess; or if we can go ahead, go ahead.

By Mr. Van Osdel:

Q. Mr. Noble, I wonder if you would equip yourself with BMC 5, so that we can mark these as we go along. We can finish with all of mine, and then somebody can take up something else.

A. What is BMC 5?

Q. I beg your pardon. I mean Exhibit No. 5.

A. You just read it in.

Q. I should like to have some mark put on BMC 5, just to keep track of the ones that have been gone over.

A. You have it there.

Q. That is right. Exhibit 5. Mr. Noble, I am going to start over again, because the testimony there before was with regard to the——

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.

[fol. 185] Mr. Van Osdel: I am going to start on page 8.

By Mr. Van Osdel:

Q. Which purports to be about the beginning of the shipment from Chicago to those points that I am interested in.

A. Yes, sir.

Q. On behalf of the Elsholtz Tri-City Lines, Incorporated, the first shipment is on page 8, January 7, 1935, from Swift & Company, Chicago, Illinois, to Detroit Lakes, Minnesota, of stencil ink, and I say to you, Mr. Noble, on prior examination it has been shown that you actually transported that shipment, so far as the evidence in this case is concerned, from Chicago to South St. Paul. That is right, is it not?

A. The Twin Cities.

Q. I notice it says on here South St. Paul. That will be known as shipment number 1. So we can correct that one at Chicago, Illinois, to what?

A. That should be a direct correction, Chicago—wait a minute.

Q. Stencil ink.

A. Here it is. O.K.

Q. Should that be South St. Paul or what? Where is Swift & Company, by the way?

A. Swift & Company is all over the United States, and this particular one might be South St. Paul, St. Paul or Minneapolis. I am not prepared to answer who B. C. is, where the destination is.

[fol. 186] Q. What shall we call it?

A. The only evidence that it went to the Twin Cities is the rate.

Q. Then, with the signatures of B. C., Swift & Company, or such signatures as you have already before testified, appeared on a number of shipments that you know were destined to Minneapolis?

A. That is correct.

Q. So, may we change that, then, to the Twin Cities?

A. You can change that shipment, yes, sir.

Q. Now, we shall call shipment number 2 the one at the bottom of the page, January 25th, 1935. That is the shipment, according to Exhibit 5, for Swift & Company, from Chicago, Illinois, to Detroit Lakes, Minnesota, 39 pounds of wrappers, at 35 cents?

A. Yes.

Q. That one can be what?

A. Twin Cities.

Mr. Boyle: In so far as this particular record shows?

The Witness: Yes, so far as the record would indicate.

Exam. Peterson: At this point may I interrupt you? Do you have any evidence to show that your truck hauled that shipment beyond the Twin Cities?

The Witness: The only evidence we would have is that at the same time we were making various kinds of intrastate shipments.

[fol. 187] By Exam. Peterson:

Q. Intrastate movements?

A. Intrastate movements for Swift & Company, where we might have hauled it beyond. We have prepared this statement. As a matter of fact I have never even looked at the signatures at the bottom. I gave all of these papers to a girl to typewrite out and sort out as to dates, because we kept no particular set of records in 1935. We had our

waybills there. I gave her these things to sort them out and list them up as they appeared, so any indication as to rate or signature was purely unintentional. It might have been, it might be our operation still. We could have hauled it because we were operating as intrastate contract carrier for Swift & Company as well as interstate. This particular item might have been carried right straight through on our truck, and our truck never unloaded it to get the .35 cent rate, no new billing out of South St. Paul but actually kept on to its destination. We find no cross on this.

Q. You don't know of any other billing?

A. We have not our complete records on intrastate movements.

Q. You do not claim you brought any operation through to Detroit Lakes?

A. We are satisfied to admit this freight bill as proof.

By Mr. Van Osdel:

Q. The shipment would actually become intrastate shipment on a new billing?

A. That is satisfactory, yes.

[fol. 188] Q. So far as we are concerned with this hearing to confine ourselves to the proof you have submitted to us to examine, it is clearly a shipment from Chicago to the Twin Cities.

A. That will be satisfactory.

Q. All right. Turn over to page 9, to the third shipment down; that is January 25th, 1935. We will call that shipment number 3. That purports to be from Chicago, Illinois, to Fargo, North Dakota. Can you find that?

A. I have that.

Q. Without going into any detail, that obviously is a shipment from Chicago to the Twin Cities?

A. We will consider it such, yes.

Q. We may change the exhibit to that extent?

A. Yes, sir.

Q. Now, turn over to page 11 of Exhibit No. 5, and I refer you to a shipment from Swift & Company, dated March 1, 1935. That will be number 4. Do you have that in front of you?

A. Yes.

Q. Without any detail, that obviously is also an error?

A. We will say so.

Q. It should be from Chicago to Twin Cities, is that right?

A. That will be correct.

Q. Just so that there will be no misunderstanding, Mr. Noble.

A. We will agree on those shipments.

Mr. Boyle: We will agree it is subject to the same cross-
[fol. 189] examination that he is making of the other ones.

Mr. Van Osdel: Mr. Noble was very clear in making a statement, that so far as he was concerned that was a shipment from Chicago to the Twin Cities, and not a shipment from Chicago to Detroit Lakes, Minnesota.

Mr. Boyle: It also may have gone on beyond. So far as this record goes, he has no record to show it did go beyond.

Mr. Van Osdel: If it did go beyond it was an intrastate shipment on a new bill.

By Mr. Van Osdel:

Q. Is that right?

A. That was what an intrastate shipment might be.

Q. At any rate, it was on a new billing?

A. At any rate, it was on a new billing.

Exam. Peterson: Wait a minute. On a new billing, that that does not necessarily make it intrastate from the Twin Cities. When the shipment left Chicago, say, to Detroit Lakes, irrespective of the bill, it was still interstate.

Mr. Van Osdel: If that contention is going to be made at this stage of the proceedings, I shall have to have proof from the Twin Cities point. In the absence of it there is no assumption it was an interstate shipment. It was an intrastate shipment.

Mr. Boyle: It is admitted to be, to this point, there is no
[fol. 190] proof of a movement beyond the Twin Cities to this particular place.

Exam. Peterson: It might have been moved by somebody else's truck.

By Mr. Van Osdel:

Q. I call your attention to page 12 of Exhibit 5. That shipment is dated March 27, 1935, and purports to be from

Swift & Company at Chicago, Illinois, to Detroit Lakes, Minnesota, of stationery.

Exam. Peterson: Page 12?

Mr. Van Osdel: Yes, the last one on the page. It will be called number 5.

By Mr. Van Osdel:

Q. Do you have the original before you, Mr. Noble?

A. Yes, sir.

Q. That is obviously a shipment that so far as your operation of your truck was concerned, from that evidence there, was from Chicago to the Twin Cities; isn't that true?

A. That is correct.

Q. Now, then, the next shipment I call your attention to, is found on page 13 and it is the first one at the top of the page, and will be marked No. 6. That is March 27, 1935, and purports to be a shipment from Chicago to Fargo, of advertising matter. Do you have that before you?

A. Yes, sir.

Exam. Peterson: Weight?

Mr. Van Osdel: That is 234 pounds.

[fol. 191] By Mr. Van Osdel:

Q. Is that correct?

A. That is correct.

Q. Obviously that is a shipment which your truck took from Chicago to the Twin Cities?

A. It would appear so. However, there is no rate to substantiate that particular statement, other than it is the same signature as previously shown.

Q. That is the signature of the man that we are now convinced is obviously the man who receipted it at the Twin Cities?

A. I believe so.

Q. The next shipment, I call your attention to is one on March 28, 1935, of Derby Foods, from Chicago, Illinois, to Fargo, North Dakota. Can you find that? I shall mark that Number 7, the middle of the page. It is significantly distinguished, because it says "Derby Foods". Do you find a date on it?

A. Derby Foods. That merely says March, 1935.

Q. That is the information I haven't got to. There is no 28 on it, is there?

A. There don't appear to be any.

Q. That is obviously a shipment from Chicago to the Twin Cities?

A. It would appear so.

Q. I show you three shipments on Exhibit No. 5, page 13, which were made on the 28th. They were shipped to the Twin Cities. The shipments are obviously, the date is the 28th.

A. Well, the date is—it could be any time in the month. [fol. 192] As a matter of fact, the bill merely says March, 1935. Why it was listed 28, I don't know.

Q. That is immaterial. Now, then, I call your attention to what I will signify as shipment 8, it will be the fourth from the bottom of that same page, page 13: That is from Swift & Company, Chicago, Illinois, to Detroit Lakes, Minnesota, 65 pounds of wrappers. Do you find that?

A. Yes.

Q. It shows they are via Noble Truck Line to South St. Paul.

A. Yes.

Q. That was obviously a shipment that was not carried by your truck line as far as that particular evidence is concerned to Detroit Lakes; that was hauled by you to the Twin Cities, from Chicago to the Twin Cities.

A. That is correct.

Q. I refer you to page 14, half way down the page, which is dated 4/11/35; Chicago, Illinois, to Fargo, North Dakota, canned goods. Mark that number 9. Now, obviously a 3,000 pound shipment was also hauled by you from Chicago to the Twin Cities, was it not?

A. Along the same line of reasoning, yes.

Q. We will change that to Twin Cities, may we not?

A. Yes, sir.

Q. The next shipment I call your attention to is on page 15. That is the 20th day of April, 1935, a shipment [fol. 193] from Chicago, Illinois, to Detroit Lakes, Minnesota. I shall call that shipment number 10. Do you have that before you, Mr. Noble?

A. I believe so.

Q. And obviously that is a shipment from Chicago, Illinois, to the Twin Cities, isn't it?

A. It is.

Exam. Peterson: Just a moment, now. What is the destination shown on page 15?

Mr. Van Osdel: Detroit Lakes, Minnesota.

Exam. Peterson: General commodities?

Mr. Van Osdel: It was really Twin Cities.

Exam. Peterson: Yes.

By Mr. Van Osdel:

Q. Talking about the commodities, Mr. Noble, I notice you have listed at page 15, of Exhibit 5, that was a shipment of general commodities. Now, look at the evidence you have in your hand, and those general commodities, by reading it into the record, what are they? Isn't it a fact it consists of wrappers, papers and cartons only?

A. I believe that is correct, paper wrappers, bundles and paper cartons.

Q. Is that your definition of general commodities, so far as the exhibit is concerned?

A. For want of better term, yes.

Q. Is the rest of your exhibit based on that system of listing your commodities?

[fol. 194] A. We are prepared to show what they are based on.

Q. Here is a shipment that was of wrappers, papers, cartons, and so far as informing the record is concerned, at page 15, you say it called for general commodities, and so listed it. is that correct?

A. That is correct.

Q. I call your attention to page 16, the fifth shipment down from the top, which will be shipment number 11, and it is April 26, 1935, Swift & Company, Chicago, Illinois, to Detroit Lakes, Minnesota.

A. That is true.

Q. Which is wrapping paper, fly spray, 133 pounds. Is that right?

A. Yes. Wrapping paper, tub panels.

Q. Your exhibit says, fly paper, fly spray.

A. It would appear that is, we have fly spray on the sheet following this.

Q. Speaking of the destination again, I notice now that there are some new initials at the bottom there, Swift & Company, W. N.

A. Yes, sir, it would appear that is a new man.

Q. Now, then, without any argument, would you say that that shipment was from your trucks, from Chicago to the Twin Cities, or do you want to say it was hauled beyond?

A. It would appear that would depend on how many times [fol. 195] W. N. comes into the picture here, on the shipments.

Q. If you turn over several pages you will notice that W. N. is signed for St. Paul, Minneapolis and Montevidio, so there is no question but he is also at the Twin Cities?

A. B. C. must have been on his vacation.

Q. So the signature, W. N. indicates Swift & Company is also a signature of some party at the Twin Cities, is it not?

A. I believe so.

Q. So then what we will call shipment number 11, Chicago to Detroit Lakes, is Chicago to the Twin Cities; isn't that so?

A. On what page is that? The one we are now talking about.

Q. You are over here on fly spray.

A. Yes. O.K.

Exam. Peterson: By the way, what you term shipment number 10, what is the weight of that?

The Witness: There are quite a number of items.

Exam. Peterson: It was wrapping paper and cartons.

By Mr. Van Osdel:

Q. I think that was around 2,900 pounds.

A. This is about 2,992 pounds.

Exam. Peterson: 2992.

By Mr. Van Osdel:

Q. Now, turn to page 16 again. Having disposed of what is termed shipment 11, which is the fifth shipment down, going down a little further, you notice a shipment 4/26/35 to Grand Forks of peanut butter, Chicago shipment, signed Swift & Company, W. N. 869 pounds; we will call that ship- [fol. 196] ment number 12. Did you find that there, Mr. Noble? Derby Foods, 4/26/35?

A. I believe this is it.

Q. 4/26/35, Chicago to Grand Forks. That is a shipment from Chicago to the Twin Cities, is it not?

A. Yes, sir.

Q. We may change that to the Twin Cities?

A. You bet.

Q. Now, then, next to it is a shipment on the same day from Chicago to Fargo, North Dakota, peanut butter. I will designate that number 13. I think that is one I couldn't find, Mr. Noble.

A. Yes.

Q. That also is a shipment on the same day as the Grand Forks shipment. It only went as far as your truck is concerned to the Twin Cities?

A. Yes, sir.

Q. Now, then, I go down to the third one from the bottom, 4/29/35, from Chicago to Detroit Lakes for Swift & Company, of bags. I will signify that as shipment number 14. I will ask you to look at it, and see if it is not a fact that is also a shipment only to the Twin Cities *which* B. C. is apparently back from his vacation?

A. That is true.

Q. It is not a shipment from Chicago to Detroit Lakes. [fol. 197] It is a shipment from Chicago to the Twin Cities?

A. Yes, sir.

Q. Does it say on there "Noble Transit" to St. Paul?

A. Yes, it does.

Q. Now, turn over to the next page, page 17 of your Exhibit. Let us make it 18. The third one down is 5/9/35, Derby Foods, Chicago, Illinois, to Fargo, North Dakota, canned goods.

Mr. Boyle: There is none on 17.

Mr. Van Osdel: That will be called shipment 15. Now, we have another man signing, do we not, by the name of Norton. That one is 5/9/35. We will signfy it as shipment 15, from Chicago to Fargo of canned goods. Now, it is a shipment from Chicago to the Twin Cities, is it not?

A. That is true.

Q. For your information in the record, isn't it a fact that by thumbing through some of these shipments, you will find the signature of Norton appears thereon, shipments that are destined for Brainerd, Minneapolis and other points?

A. Yes.

Exam. Peterson: What is the weight?

Mr. Van Osdel: 650 pounds.

By Mr. Van Osdel:

Q. Now, then, just for the information of the record, Mr. Noble, I notice that you have signified in your Exhibit 5, page 18, that was a canned goods shipment. Will you look and see as a matter of fact it is a shipment wholly [fol. 198] of canned meat, is that right?

A. Canned goods, and canned meat is canned goods.

Q. I will ask you this question, then——

A. Yes.

Q. Is it your understanding in the operation of this exhibit, when you came up on a shipment that was canned meat you would make it canned goods?

A. It would be my idea that is what the girl did, yes, sir.

Exam. Peterson: It would not mean canned vegetables.

The Witness: W 'l, canned items are classed as canned goods in this exhibit.

By Exam. Peterson:

Q. If meat is canned goods and vegetables are canned goods, there is no way of telling the difference on the record, is there, from the exhibit?

A. Well, to me canned goods is canned goods. I don't know what the classification, what the distinction is in canned goods. If the thing is put in a can it is canned goods, I would think, as far as I am concerned I would not be able to designate except to look at the freight bill which is given me, canned corn, canned peas, or just plain cans.

Mr. Van Osdel: The only purpose of my explanation at this time is to examine him relative to that point, to show that this applicant is very much a transporter of meats, both canned, fresh and so forth. This shipment was meat. An investigation of the record would lead you to believe [fol. 199] it was some other canned goods that he did not transport.

By Mr. Van Osdel:

Q. Calling your attention to the next shipment, 5/11/35, which is a shipment, Derby Foods, from Chicago, Illinois,

to Grand Forks, North Dakota, of canned foods. I will designate that as number 16.

A. I believe so, yes, May 11th.

Q. Yes. Isn't it a fact, Mr. Noble, and you have the record of the shipment before you, that I have just asked you about, have you not?

A. I have.

Q. Isn't it a fact that it is on a piece of paper headed Derby Foods, Incorporated?

A. That is true.

Q. Isn't it also a fact that no place on that piece of paper does the name Noble Transit or Noble appear in any shape or form?

A. That is correct.

Q. Also there is no way of knowing you made that shipment?

A. We must have hauled it or we would not be allowed in the Derby vaults to take it, a piece of paper of that kind. I don't think another trucker would be kind enough to give me his sheet of paper. So we must have hauled it some way.

Q. The point I am getting at, I don't doubt you hauled it part of the way.

A. There is nothing to indicate we did not haul it, I will say.

Q. At the same time there is nothing to indicate that you [fol. 200] hauled it at all, is there?

A. That is true.

Q. Apparently that was only a shipment from Chicago to Minneapolis?

A. I wouldn't say that, no, sir.

Q. All right. I call your attention to the shipment number 12345 from the bottom of the page 18. Before taking up that shipment, Mr. Noble, I called upon you to furnish us some other information that might enlighten the record relative to that shipment to Grand Forks. Is it possible for you to do that?

A. I would be unprepared to give you any other exhibit than what we show here, as far as actual knowledge as to whether this was left at Madison, Wisconsin, Twin Cities, and actually delivered to Grand Forks.

Q. At the same time you are not prepared to say whether you took it to Grand Forks?

A. I would not make a definite statement.

Q. Item number 16, which is a shipment 5/11/35, shipped from Chicago to Grand Forks, of canned goods, it is a fact, Mr. Noble, is it not, to make the record clear, that the original record which has been submitted to us for our inspection, which you are looking at now, does not show the Noble Transit or name Noble on it in any way, shape or form?

A. That is correct.

Q. Now, relative to the shipment, I call attention to the [fol. 201] fifth one from the bottom, on page 18, which we will signify as shipment number 17, which is a shipment 5/20/35, Swift & Company, Chicago, Illinois, to Fargo, North Dakota, of rack and table. Will you look at that shipment?

A. I have.

Q. What is the weight?

A. 998 pounds.

Q. It is a fact, is it not, Mr. Noble, that shipment, so far as your truck was concerned, according to the record, hauled it from Chicago to the Twin Cities?

A. Yes, sir.

Q. We may change that to the Twin Cities?

A. Yes, sir.

Q. Now, then, I call your attention to the very next shipment. We will signify that as number 18.

By Exam. Peterson:

Q. By the way, will you go back there to number 16, and show the weight of that shipment?

A. That was about 4,200 pounds; 4,119 pounds.

Q. 4,119 pounds?

A. Yes.

Exam. Peterson: Thanks.

By Mr. Van Osdel:

Q. Would you take a 5,000 pound shipment to Grand Forks if you had no other merchandise to go with it?

A. No, sir.

Q. Calling your attention to what I have signified as item [fol. 202] 18, which is a shipment dated 5/20/35, Swift & Company, from Chicago, Illinois, to Detroit Lakes, stationery, will you look at that?

A. Yes, sir.

Q. And on the original record, will you look at it? It shows to St. Paul by Noble?

A. Yes.

Q. That is a shipment which did not go to Detroit Lakes. It went to the Twin Cities, is that right?

A. Yes.

Q. We may correct it?

A. Yes, sir.

Exam. Peterson: Weight?

By Mr. Van Osdel:

Q. What is the weight?

A. 674 pounds.

Q. Now, then, I call your attention to page 19, the second shipment from the bottom. I will call it shipment 19, which was transported on May 29th, 1935, from Chicago, Illinois, to Detroit Lakes, Minnesota, which was a tarpaulin weighing 176 pounds. Isn't it a fact that was a shipment that went from Chicago to the Twin Cities?

A. Unless it went intrastate beyond on our truck.

Q. I see. So far as the shipment, the record that you have before you, it was a shipment which ended up at the Twin Cities on that operation?

[fol. 203] A. With the Swift signature, B.C.

Q. Yes. If it went on beyond it was intrastate shipment, is that right?

A. I would not admit that, but I say that it is a bill which has the signature B.C. on it.

Q. Yes. That would signify it was receipted for at the Twin Cities?

A. That is true.

Exam. Peterson: Mr. Van Orsdel, do you contend that the shipment went from Chicago to the Twin Cities; was there stored; than another shipment was made later, an intrastate shipment?

Mr. Van Orsdel: I can't be obliged to take any position of that kind.

Exam. Peterson: You bring in here it moved intrastate.

Mr. Van Orsdel: I did not signify that.

The Witness: I made the suggestion I might have possibly hauled it up on the same truck that it came in, on the interstate operation, as an intrastate billing, purely for the standpoint of collecting the freight on it. In other

words, we may move this stuff in from Chicago on the Chicago billing.

By Exam. Peterson:

Q. Yes.

A. We may have a truck going out of here to Detroit Lakes, to Fargo, that would give us movement, and on which we would continue to carry this stuff through without not having it hit the dock.

[fol. 204] Q. The entire shipment would be an interstate shipment from Chicago to Detroit Lakes?

A. The only thing to disprove that this might not be an interstate shipment, the fact that it is Swift & Company, B.C., who is the receiving clerk at St. Paul. That don't prove that I did not haul it clear through.

Q. You haven't any definite proof?

A. I haven't any definite proof to that effect.

Mr. Van Orsdel: That is all. I might add, Mr. Examiner, they furnished us with this proof. I wish to meet that proof. That is the proof he says he prepared Exhibit 5 from.

Exam. Peterson: Yes.

Mr. Van Orsdel: It is apparent that the shipment ended at the Twin Cities. If he brings that other proof we will examine it when it comes. There certainly can't be any presumption it is an interstate shipment in the total absence of any other proof.

Exam. Peterson: The reason I received that some time ago. He said that shipments that moved to Detroit Lakes, moved intrastate.

Mr. Van Orsdel: He said that. Interstate, he said.

Exam. Peterson: Yes. Well, if it moved in the continuous movement, it would not be intrastate, even if it moved on a truck, interstate truck, if would be interstate, has that ford?

Mr. Van Orsdel: I am not in a position to argue that at [fol. 205] all. The only thing I am going into here is the facts of the record.

Exam. Peterson: He has got to prove it moved in his truck.

By Mr. Van Osdel:

Q. We had concluded with the second one from the bottom of page 19.

A. Tarpaulin.

Q. That is Detroit Lakes, a shipment of tarpaulin. The next one will be 20. That will be found on page 20. It will be number 20 itself. That is a shipment on the 17th day of June, 1935, from Chicago, Illinois, purporting to go to New Rockford, North Dakota, paper bags, and weighing 1,140 pounds, signed by Swift & Company, B.C. Obviously it is a shipment, so far as the record you have produced for us, is a shipment that went from Chicago to the Twin Cities on your truck, and no further; isn't that right, now?

A. We surely didn't haul it into North Dakota.

Q. You didn't surely haul 1,140 pounds into New Rockford?

A. That is correct.

Q. So we may change that to the Twin Cities?

A. Yes, sir.

By Exam. Peterson:

Q. Your application does not even cover it?

A. No. It is some clerical error.

By Mr. Van Osdel:

Q. That is one thing I would like to ascertain later, the application covers the whole state, as far as I am concerned. [fol 206] Now, then, I will refer you to the first part of Exhibit 5; namely, at page 7. We have a bundle of proof. I call your attention, Mr. Noble, to the shipment which appears on page 7 of your exhibit 5.

A. Yes.

Q. Which is dated June 22nd, 1935, South St. Paul, Minnesota, to Grand Forks, North Dakota, and Detroit Lakes, Minnesota, apparently of plant sales.

A. Yes.

Q. Is there any way of ascertaining what the shipment consisted of to Grand Forks?

A. I think Swift & Company will testify as to what the plant sales commodities would include.

Q. You have signified it as plant sales, page 7, have you not?

A. Yes.

Q. I show you the billing on it, which is the record you have before us, which you have given to us as the original record, and see if that don't have a destination as Bill Whalen Transfer Company, Grand Forks?

A. That is correct.

Q. I notice Mr. Bill Whalen has signed it.

A. Yes, sir.

Q. Do you know whether or not your truck took it all the way to Grand Forks?

A. Yes, sir, I am positive.

[fol. 207] Q. Isn't there on the record that you have before you a list, not consisting of a great deal, I would say not to exceed thirty articles listed thereon?

A. That is correct.

Q. It appears to be on one side there is meats, and on the other side there is sausages and dressing, and then there is also poultry, butter and eggs and other items. Is that a fact, on the record that you are looking at?

A. The bill speaks for itself. It is their own billing.

Q. Answer the question, please. Isn't that a fact? The shipment to Grand Forks would not consist of any commodity not listed on there?

A. I do not agree with that.

Q. The billing is not correct, is it?

A. The billing is correct as to weight and as to the destination.

Q. You would not say it was correct as to the use of the commodities described?

A. We are not attempting to bill those as commodities.

Q. I notice this is a listing of some thirty items there.

A. This is a general thing. This particular type of billing is the type of billing used on truck routes to indicate the total weight to the break-bulk point of the car route distribution.

Q. You don't know whether or not it contained those [fol. 208] items or other items?

A. The items would have to be classified as plant sales. It might included anything and everything that Swift & Company handled.

Q. On that same bill I notice is a shipment to Detroit Lakes, isn't it?

Q. That is correct.

Q. That shipment on page 7 shows the point of origin South St. Paul?

A. Yes, sir.

Q. So that portion that went to Detroit Lakes was clearly intrastate?

A. Was clearly intrastate. That is typical of what might have happened in some of these others.

Q. So the assumption, so far as that item is concerned, is only an item so far as the Interstate Commerce Commission is concerned in intrastate shipments or shipment from St. Paul to Grand Forks only, isn't it?

A. Well——

Q. If it isn't, say so.

A. This particular load might illustrate perfectly the contention we have been making as to the Chicago shipments coming in on our truck, being billed out on a Detroit Lakes billing, such as here is an item that our truck probably hauled in from Chicago, items of chemicals to Detroit Lakes [fol. 209] where we have it listed as an intrastate billing; we might have been able to show or could probably show that we actually carried that same article through on an interstate to St. Paul, the point he has been making right along. In other words, on the same date, 65 boxes from [fol. 210] St. Paul to Detroit Lakes, Minnesota. We undoubtedly hauled that right directly through to South St. Paul, thus connecting up with this Route 90 to Grand Forks. The trucks that hauled it on an interstate shipment, and as far as the price is concerned because we had been paid originally for it on the thirty five cent rate from Chicago to South St. Paul. This is typical of what could have happened and did happen occasionally in the particular items in question, in the past, although this happens to be the only billing that we have in our records that we are able to produce.

By Mr. Fiddes:

Q. Do your records show it started at South St. Paul, went to Detroit Lakes, came to South St. Paul by the tracks?

A. Our records are incomplete.

Q. As a matter of fact, it might have?

A. It is an example of how the movements have been handled. It would be an example.

Q. You can testify it came to South St. Paul in your truck. You can testify to that?

A. Well, I expect it was there.

Q. At the present time?

A. I can't testify. Presumably it happened.

By Examiner Peterson:

Q. How can you presume?

A. If I can't match up St. Paul, coming out of St. Paul on the day it is going out, it would indicate that we have [fol. 211] moved that directly.

By Mr. Van Osdel:

Q. Now, Mr. Noble, that we do not forget it, it is a fact, is it not, so far as the information you have before you on the record that you have allowed us to examine, it appears that that shipment from St. Paul to Detroit Lakes, Minnesota, was an intra-state shipment?

A. We are not interested in intra-state movements at that particular point.

Q. Just a minute now. Will you answer my question, please?

A. Repeat it.

Q. Isn't it a fact from the records you have before you that you are not able to ascertain nothing different than that shipment was not an intra-state shipment and therefore not relevant to these proceedings, isn't that a fact?

A. Will you give me a couple of minutes?

Q. Yes.

A. I will match up this one here. 622 on truck 90, 2 boxes of chemicals from South St. Paul to Detroit Lakes went directly on date of June 20th, 1935, on a South St. Paul shipment of Swift & Company in which they have two boxes of chemicals to Detroit Lakes, Minnesota. Wait, the commodity is identical. I will take the next item.

Q. Wait a minute. Let us dispose of the former item. It is a fact, Mr. Noble, is it not, that the shipment from Chicago to St. Paul of the item you just mentioned was in with [fol. 212] a number of other items and receipted for by Swift & Company, BC South St. Paul?

A. That is correct.

Q. That it was covered in a general way with a specified rate of thirty five cents?

A. That is correct. That this particular item moved under that general commodity list from Chicago, being based on a load going north, stopping at Detroit Lakes.

Q. Just a minute, Mr. Noble. You don't know that of your own knowledge, do you?

A. The record would indicate that.

Exam. Peterson: He has gone in and compared the two bills of lading.

By Mr. Van Osdel:

Q. All you know from the record is you received certain merchandise from Chicago that was receipted for out of Twin Cities and that in turn you had another shipment that started from the Twin Cities and had a point of destination at Detroit Lakes, Minnesota. That is all you can tell from the records?

A. We are as certain about this as you might be certain of the place where that signature reads.

By Mr. Boyle:

Q. You do know that shipments actually were so handled at times?

A. Yes.

Q. Whether this particular shipment or not?

[fol. 213] A. That is correct.

By Mr. Van Osdel:

Q. What freight bill do you have on the Detroit Lakes shipment from St. Paul, South St. Paul to Detroit Lakes? Do you have any record of that there?

A. Yes, sir.

Q. Will you tell me what the rate is?

A. That rate is the Minnesota rate.

Q. The rate is the Minnesota intra-state rate, is it not?

A. That is correct,—the only way it could be billed, South St. Paul.

Q. In other words, you received the full rate for the carriage of the merchandise thirty five cents a hundred from Chicago to the Twin Cities. Then you in turn billed it out at some later time on a new billing and charged the intra-state rate from the Twin Cities to Detroit Lakes, Minnesota. Isn't that a fact?

A. And collected the intra-state rate.

Q. You collected?

A. I did not charge it. I collected it.

Q. Didn't you make that charge?

A. The billing was made at Swift & Company. We received our payment of the billing that was handed us by Swift & Company.

Q. Will you show that to me, please?

A. Right here.

Q. Show me the billing from the Twin Cities to Detroit [fol. 214] Lakes, will you please?

A. Here. These various items.

Q. So you have before you a bill; have you not, dated——

Exam. Peterson: A freight bill.

By Mr. Van Osdel:

Q. A freight bill dated June 27th, 1935 with the Noble Transit Company's name at the top, in which the shipper is Swift & Company, South St. Paul and consignee is Detroit Lakes, Minnesota, isn't that the fact?

A. That is correct. The consignee is Route 90, we will say, Route 90 being destination Grand Forks, North Dakota.

Exam. Peterson: Just a moment there. The date of the shipment from South St. Paul, to Detroit Lakes, is June 22nd, 1935?

Mr. Van Osdel: I was going to cover that.

Exam. Peterson: Oh, all right.

By Mr. Van Osdel:

Q. Will you refer to the shipment from Chicago of the merchandise on the day in question? Now, Mr. Noble, you have before you the evidence of the shipment from Chicago to Twin Cities of the merchandise, amongst which was the merchandise which went from South St. Paul on to Detroit Lakes, have you not?

A. That is correct.

Exam. Peterson: You say you have before you evidence.

By Mr. Van Osdel:

Q. You have before you, what would you call it, Mr. Noble? What have you there?

[fol. 215] A. I would say this is an expense bill, shipping order, where Swift & Company, Chicago, are the shippers, sort of joint master bill, so as to speak, to South St. Paul,

at which these various shipments would be partaken of for a truck line going south, one east, one north, one west, the north one in this particular case being right on our particular truck to its final destination.

Q. Was it receipted for by Swift & Company? At South St. Paul?

A. In Detroit Lakes, Minnesota.

Q. We are talking about all of this shipment?

A. The entire shipment was receipted by Swift & Company, South St. Paul.

Q. That was dated June 20th, 1935, was it not?

A. Well, the bill was dated that day. Of course, it takes some time to get it from Chicago.

Q. Now, then, do you have any such bill for the shipment that went from Detroit Lakes to South St. Paul other than the freight bill?

A. I have the delivery slip going to Detroit Lakes.

Exam. Peterson: In this connection it ought to be clarified as to what the shipment means. Does it mean the date the shipment left Chicago? The bill of lading date?

Mr. Van Osdel: That is what I am trying to get at. You mean on all of these shipments?

Exam. Peterson: All of these shipments here. What would apply in connection with one applies to all of them.

Mr. Van Osdel: I am interested, since they have been [fol. 216] changed from Minneapolis, rather than points in Minnesota.

Exam. Peterson: You bring dates in here in connection with this shipment, like one from St. Paul, Minnesota to Grand Forks, or Detroit Lakes, and your question him quite a little about the dates there. I want it clear as to what date he is using there.

Mr. Van Osdel: I don't know.

Exam. Peterson: Maybe you can answer that. They are all prepared right from the freight bills.

Mr. Van Osdel: ——.

The Witness: They are from the bills of lading.

By Exam. Peterson:

Q. Is that the date the shipment left Chicago or what?

A. This would appear to be the date this particular shipment left Chicago at 10:20 A.M. on June 20th, 1935.

Q. Yes, but the date you have shown here is June 22nd, 1935. What date is that?

A. That is the date this particular truck left South St. Paul, heading for Grand Forks, North Dakota.

By Mr. Van Osdel:

Q. No, your freight bill here, that is dated June 27th. That was made out later?

A. This merely shows the date the shipment is shipped. The freight bill has been made out later.

Q. That is what I say.

A. Yes, that is correct.

Mr. Van Osdel: Now, Examiner Peterson, I didn't, as [fol. 217] you say, ask about these different dates. Do you wish me to go back over that?

Exam. Peterson: I guess they are all bill of lading dates. Aren't they? They are supposed to be bill of lading dates?

The Witness: That is correct.

Mr. Van Osdel: As I recall that is about the only freight bill there was. The rest of them were bills of lading and receipts.

Exam. Peterson: Yes.

By Mr. Van Osdel:

Q. Now, Mr. Noble, I should like to ask you concerning that shipment which we called shipment number 20 which is on page 7, the fifth one down. That is the one that we are just now talking about. I asked you where the Bill Whalen Transfer is?

A. I would take it it is in Grand Forks, North Dakota.

Q. Do you know that Bill Whalen was the signature on there of the receipt of the entire shipment?

A. Yes, I believe that is correct.

Q. Do you have any idea how that shipment was routed?

A. Yes, sure.

Q. Inform the record how it was.

A. This particular freight bill of lading has a total weight on it for Detroit Lakes, Minnesota, as a basis for figuring the entire load of the truck and the plant sales, weight, signature, designated by total weight for Grand Forks. That is what might be called the Master Bill. Accompany- [fol. 218] ing this Master Bill is a considerable number of

delivery slips which total up to 3826 pounds; those bills turned over to Bill Whalen at Grand Forks, North Dakota. This 2954 pounds as indicated on this Master Bill is the total weight comprised in these particular shipments for which we have signatures Swift & Company, W. W.; Swift & Company, W. W., the same, the same, the same. For the purpose of billing this particular item, Swift & Company, South St. Paul placed the various rates and attached it to the document here.

Q. Were the shipments that went to other places, were there other shipments that went to other places besides Detroit Lakes or not?

A. In this truck?

Q. Yes, to different places in Detroit Lakes?

A. These are the shipments. These are the bills of lading for the shipments that went to Detroit Lakes.

Q. To different parties, then?

A. I would say that these are consigned to Swift & Company's produce plant, Detroit Lakes, Minnesota. These are all to the Swift & Company produce plant.

Q. They are different bills of lading there. Does that mean there are different kinds of items, perhaps?

A. These particular items are mentioned, two boxes of chemicals; 7—you got to be——

Q. At any rate they were different items, were they not? [fol. 219] A. Yes, general commodities.

Q. Yes. Now, then, did that shipment, so far as you are concerned, was it dropped off by your truck out of St. Paul into Detroit Lakes, or was it dropped off at Grand Forks?

A. That was dropped off at Detroit Lakes.

Q. On the way out, isn't that a fact?

A. I would imagine we would drop it off there, or it might have been possible we would haul it through to Grand Forks.

Q. Mr. Whalen's signature on there, it is not a different receipt from Detroit Lakes?

A. No.

Q. I notice this is the same bill?

A. He might be a little messy as he signs it. He probably should have scratched out the Detroit Lakes.

Q. It is reasonable to believe Detroit Lakes was delivered first, is it not?

A. Bill Whalen signed for that. It was left off, 13826 pounds, that was left at Grand Forks.

Q. That was left at Grand Forks. That is what went to Grand Forks. That is exclusive of what went to Detroit Lakes?

A. Yes.

Q. What went to Detroit Lakes is 2954 pounds?

A. That is correct.

Q. Mr. Noble, I should like to know so far as North Dakota and Minnesota is claimed, what are you claiming as to your grandfather rights in this field? Let us take the [fol. 220] state of North Dakota first?

A. Fargo and Grand Forks.

Q. Fargo and Grand Forks?

A. Yes, sir.

Q. No other points in the State of North Dakota?

A. No, sir.

Q. Now, then, when it comes to the State of Minnesota, keeping in mind I am interested in the relations of the Elsholtz Tri-City Lines, are you claims for grandfather rights territorial claims or route claims?

A. Territorial claims.

Q. What is the boundary, let us say, on the north in the State of Minnesota?

A. Oh, Canada.

Q. So it goes all the way to the northern boundary of the State of Minnesota, does it?

A. It does.

Q. As long as we are on the State of Minnesota, although I am not so much interested, what are the other boundaries of the State of Minnesota?

A. I would say the western boundary of the State of Minnesota, the northern boundary of the State of Minnesota, in fact, the entire State of Minnesota.

Q. The entire State of Minnesota has an irregular operation, Mr. Noble?

[fol. 221] A. Has an irregular operation, contract carrier, yes, sir.

Q. Now, let me ask you this other question. Are you claiming grandfather rights as between operator or a to operator? I mean by that do you claim grandfather rights to operate into Grand Forks and Fargo and out of Grand Forks and Fargo?

A. We believe we are satisfied as in the particular case of North Dakota we are satisfied purely as an outbound movement out of the Twin Cities.

Q. Of course, it is not what you are satisfied with, Mr. Noble. I am trying to get what your grandfather claims are.

A. Our claims in the application, I believe you are capable of determining yourself. I have not seen it for some some myself.

Q. Mr. Noble, I came here prepared for the whole state of North Dakota. That is what you claim? Now, you say Grand Forks and Fargo. I am a little at loggerheads myself. I have a copy before me. It shows the entire state.

Exam. Peterson: Off the record.

(Discussion outside the record.)

Exam. Peterson: On the record.

By Mr. Van Osdel:

Q. And the notice also says North Dakota.

A. We claim only Fargo and Grand Forks.

Q. So, Mr. Noble, you are claiming grandfather rights in this case to only the towns of Fargo and Grand Forks, as far as the state of North Dakota is concerned?

A. That is correct.

[fol. 222] Q. If you will refresh your memory to my question a few minutes ago, do you claim grandfather rights to operate into those towns or out of those towns or both, into and out of those towns?

A. Just into those two towns.

Q. Just into those two towns?

A. Yes.

Exam. Peterson: From where?

By Mr. Van Osdel:

Q. From Where?

A. From points any place in the various portions of the territory asked for.

Q. Do you mean by that, let us say, from Chicago to Grand Forks, and from Minneapolis to Grand Forks, Chicago to Fargo and Minneapolis to Fargo?

A. Yes.

Q. You are only claiming grandfather rights into the towns of Fargo and Grand Forks, North Dakota and not out?

A. Yes.

Q. Do you claim grandfather rights to transport interstate merchandise into Fargo, North Dakota and Grand Forks, via, let us say, Minnesota?

A. No, sir.

By Exam. Peterson:

Q. In other words, you go empty?

A. We come empty back.

Mr. Van Osdel: That is not the back movement. I am talking about a little freight movement in between there.

Exam. Peterson: Yes, everything is in one direction.

[fol. 223] The Witness: That is correct.

Exam. Peterson: Nothing goes back.

Mr. Van Osdel: I am not talking about going back. I am talking about going between Fargo, North Dakota and Grand Forks, North Dakota.

The Witness: That is Minnesota.

Exam. Peterson: Does he operate that way at all?

By Mr. Van Osdel:

Q. Mr. Noble, here is what we call United States Highway 75 that runs right along the river in the State of Minnesota and gets to the State of North Dakota, is it not?

A. I believe so if you say so.

Q. At any rate, you can travel from Fargo, North Dakota to Grand Forks, North Dakota by just going across the river and going along the river on the Minnesota side. I believe you know that?

A. I have never travelled it.

Q. You are not claiming grandfather rights to do that, are you?

A. No, sir.

Q. The only thing you are claiming grandfather rights to so far as the State of North Dakota, if you will pardon me, stating it again, is to operate into the city of Fargo, into the town of Fargo, North Dakota, and into the town of Grand Forks, North Dakota, from other points on your operation?

A. That is correct.

Q. Not out of those towns or between those two towns?
[fol. 224] A. That is correct.

Exam. Peterson: That ought to be clear. Suppose he has a shipment going to Grand Forks. Would he go, any shipment going to Fargo, would he go to Fargo and deliver part of the shipment there and then go on to Grand Forks?

Mr. Van Osdel: He can't do that.

Mr. Boyle: What you are talking about if he handled a shipment at one of those points that originated at the other point?

Mr. Van Osdel: That is right.

Mr. Boyle: He said no, he don't want to.

By Mr. Van Osdel:

Q. You understand, Mr. Noble, my question was directed to the proposition of transporting interstate merchandise from Fargo, North Dakota to Grand Forks, North Dakota, that would have a point of origin at either one of those points?

A. I understand.

Q. You are not claiming grandfather rights on that?

A. No, sir.

Q. And where the operation would be in the State of North Dakota, do you intend to transport interstate merchandise into Fargo and into Grand Forks where there is a point of origin at either one of these places, where you move from within the State of North Dakota?

A. No, sir.

Mr. Van Osdel: That is all I have at this time.

[fol. 225-227] Exam. Peterson: We will recess until tomorrow morning. We will adjourn at five o'clock until 9:00 o'clock tomorrow morning.

(At 5:00 o'clock P. M., adjourned until 9:00 o'clock A.M., September 22nd, 1938.)

[fol. 228] St. Paul, Minnesota, September 22nd, 1938.

Met, pursuant to adjournment, at 9:00 o'clock a. m.

Before: C. J. Peterson Examiner, Interstate Commerce Commission.

Appearances: As heretofore noted.

COLLOQUY

Exam. Peterson: Let us come to order.

Mr. Boyle: Mr. Examiner, upon resumption this morning, I wish to say Mr. Noble testified yesterday as to the several statements introduced as exhibits relating to shipments and stated that they were taken from receipts and bills of lading in his records; that those records were turned over to a clerk or stenographer to be run off and tabulated.

Exam. Peterson: Yes.

Mr. Boyle: It developed the tabulation was correct from the bills, for instance, on those South Dakota points that were questioned yesterday.

Mr. Van Osdel: North Dakota.

Mr. Boyle: North Dakota. The billing actually made by Swift & Company from which the statement was taken showed those points as destinations from Chicago. It developed upon a critical examination of those bills that all of those shipments, I believe, maybe with one exception, had found their destination in St. Paul and there was no documentary proof that they had moved beyond St. Paul [fol. 229] by the Noble line. Presumptions or speculations might be indulged in, but so far as documentary evidence on the movement is concerned, we did not have it. That led to a more critical inspection of every one of the tickets, records and shipments. With the idea of possibly shortening the cross-examination and having the record perfectly clear as to any apparent discrepancies between the statements taken off the exhibits, and what might be developed from a critical inspection of the tickets, due to the fact that some of them, to some points, were so billed and through a clerical error, were taken off that way, I want to say there are some other points in the northern portion of Minnesota which would be subject to the same analysis, and undoubtedly the same line of questioning and the same answers.

Mr. Fiddes: As were given to Mr. Van Osdel yesterday?

Mr. Boyle: Yes, sir. In other words, at certain points in addition to those Mr. Van Osdel questioned about yesterday up in Minnesota, north of St. Paul and that section, the points which I will enumerate in a moment, while the billing from which the exhibit was taken shows a through movement from Chicago, let us say, to this particular des-

tination beyond St. Paul, we would not have documentary evidence to prove the movement beyond St. Paul by the Noble Line; and it is undoubtedly true that many, maybe most, maybe all, I am not sure, those shipments, as far as Noble is concerned, terminated in the Twin Cities, and that the movement beyond was otherwise accomplished. [fol. 230] The towns that I have in mind, and I will give you the reference to the pages of exhibit 5 where they occur are Sauk Center Minnesota——

Mr. Van Osdel: I think your idea is very fine. May I state further, would it be possible to number them? I numbered them 1 to 20 yesterday and think that we might number them all so that we can number them in the brief.

Mr. Fiddes: You are numbering shipments. He is going to number towns.

Mr. Van Osdel: You are going to refer to towns?

Exam. Peterson: Better refer to the towns by their names.

Mr. Boyle: This will give you reference also to the shipments. Off the record.

(Discussion had outside the record.).

Mr. Boyle: Sauk Center, Minnesota appears on exhibit 5, pages 7, 13, 14, 15, 18, 20, 21 and 22, and that necessarily would identify them with the shipments as to the date shown on those pages; Waseca, Minnesota, appearing on the same exhibit at pages 8, 12, 13, 14, 15, 18 and 20; Wadena, Minnesota, appearing on page 9.

Mr. Fiddes: May I ask one question?

Mr. Boyle: Yes.

Mr. Fiddes: When you gave these pages were you endeavoring to pick each page of the exhibit and show a certain shipment to the town? Are you going to offer proof [fol. 231] to show shipments to these towns?

Mr. Boyle: All of them. If I miss any you can include those, too.

Mr. Fiddes: I was just wondering if you were withdrawing the whole town or certain shipments?

Mr. Boyle: It has to do with the pages I am citing for convenience. Brainerd, Minnesota, on pages 13, 14, 16, 17, and 18; St. Cloud, Minnesota, page 13; Montevideo; these are all Minnesota, pages 14, 16, 17, 18, 19, 20 and 21; Fergus Falls, Minnesota, on page 17; Breckenridge, Minne-

sota, on page 20. While I have not definitely checked for the purposes of this case we are willing to concede the same as to Worthington, Minnesota, appearing on pages 15 and 17. That comprises all of those and that is all of that portion. In addition, through inadvertence the town of Watertown, South Dakota appears on sheets 14, 16, and 22, and should be physically stricken. I ask that that be done.

Mr. Van Osdel: That will save a lot of time.

Mr. Boyle: I hope I made it clear, Mr. Examiner, and gentlemen of the opposition here, just exactly how this occurred. The bills in here actually show these destinations and a clerk going through them with a mass of data is going to take them indiscriminately and is not capable of making a critical examination of the individual item to know that it might have been handled a little differently from the way [fol. 232] that the billing would show.

Mr. Fiddes: I think we all agree it was inadvertently.

Mr. Boyle: It was entirely inadvertent. I think everybody knows there was a powerful lot of stuff to be gotten up.

Mr. Fiddes: Mr. Boyle, do you understand, as I believe I do, that these towns that you have now stated you withdraw your offer of documentary proof as to, constitute the points, the principal if not all the points to which the applicant was offering to prove shipments going beyond the Twin Cities, coming into Minnesota from other points east to south? Let me make this plain. Yesterday there was a claim advanced here that Mr. Noble was claiming the entire state of Minnesota. Now, you have taken certain towns and said it was through inadvertence of your documentary proof of your exhibits, we will say, that they indicate shipments carried by Mr. Noble to the towns. There are still, of course, many other towns in the State of Minnesota other than the Twin Cities, and even in the northern part of the state, in the Twin Cities, and northwest of the Twin Cities, besides these towns. You understand that there is being made now a formal restriction of Mr. Noble's claims, territorial claims, in the state of Minnesota?

Mr. Boyle: Well, I think I have your point. There may be some question as to how far a territorial claim may be allowed. It is a matter for the Commission in its final determination. So far as the proof being offered is concerned, [fol. 233] the proof as to these particular towns is limited in the manner I have indicated. We can't show the move-

ment beyond the Twin Cities, if you please. So that I am clear on this, and not evading at all, we probably have not yet had a final determination of just what territorial rights are; in other words, of how many towns you have got to prove, and where, in order to obtain territorial rights, in other words where you are only going to get them for specific towns enumerated and beyond; so I don't want to be limited in that respect, because we have it in some other matters, not Noble, but on that general principle. We will finally get a determination of that somewhere.

Mr. Fiddes: What I was going to get at, the territorial rights. I think it is generally agreed they depend basically, at least, upon proof of service, at least peripheral towns around the area.

Mr. Boyle: Could we put it this way, Mr. Noble: while not limiting the claims, that he outlined his ability to offer proof only as to these particular towns in the manner I have stated, and if that proof is sufficient to give him rights into those towns, all right. I would rather do that. I do not care about making any amendment. Let the Commission do that in its determination of the matter as to whether the proof backs up the claim or not.

Mr. Fiddes: I am still not entirely plain upon the status [fol. 234] of proof.

Mr. Van Osdel: I think what you are wondering about, Mr. Fiddes, about the towns that have now been deleted from the record?

Mr. Fiddes: They have not been deleted.

Mr. Van Osdel: Was this determined to be a point west of Minneapolis?

Mr. Boyle: You can argue that as to deletion. We are certainly limiting the proof as to those towns. So Noble is not offering documentary proof beyond Twin Cities.

The Witness: With the exception of Detroit Lakes and Grand Forks.

Mr. Boyle: Yes, with the exception of Detroit Lakes and Grand Forks.

Mr. Van Osdel: There were two shipments there.

Mr. Boyle: Yes.

Exam. Peterson: While we are on this subject, I would like to ask the witness some questions in connection with the towns he did actually serve in Minnesota on July 1, 1935 and prior thereto.

Mr. Boyle: Yes.

Mr. Slattery: May I first ask counsel, I notice on page 17 of this exhibit 5, the town of Balaton, Minnesota is included. Is that one that is missed?

Mr. Boyle: On page 17?

Mr. Slattery: On page 17, yes, sir, 10 from the top.

[fol. 235] Mr. Boyle: Balaton?

Mr. Slattery: Yes.

Mr. Boyle: I don't know where it is. I think we can give you that in a minute.

Mr. Slattery: 5-3-35.

Mr. Boyle: May 3, 1935.

Mr. Noble: Yes, we will concede Balaton, too.

Mr. Boyle: Include Balaton?

Mr. Noble: Yes.

Mr. Boyle: On page 17, anywhere else it may appear in that exhibit?

Exam. Peterson: You have no proof to Balaton?

The Witness: Beyond the Twin Cities.

Exam. Peterson: Now, I would like to ask Mr. Noble what points you claim you served——

Mr. Boyle: Mr. Examiner, just to clear it up.

JOHN F. NOBLE resumed the stand and testified further as follows:

Cross-examination.

By Mr. Boyle:

Q. Mr. Noble, you have heard my statement with respect to the shipment, and explanation in the nature of an amendment. If you please, is that correct, and in accordance with your understanding?

A. That is correct.

Mr. Boyle: All right.

Exam. Peterson: You say it is in the nature of an amendment?

[fol. 236] Mr. Boyle: An amendment to the proof.

Exam. Peterson: Yes.

By Exam. Peterson:

Q. Now, Mr. Noble, if you will, state the points in Minnesota that you claim to have served on July 1, 1935 and

prior thereto at which you are submitting documentary proof here for examination by the protestants, naming those points?

Mr. Boyle: That is on and prior to July 1?

Exam. Peterson: That is right.

Mr. Boyle: I take it they would be the points shown in exhibit 5, with the exception of these we have named here and yesterday.

The Witness: As I understand, our position is, the questions—or the answers to the questions would be problematical, and if that is showing no documentary proof those particular towns should be eliminated?

Mr. Boyle: Yes. The Examiner has asked you informatively. I have offered the suggestion they are the towns shown in exhibit 5 and they are limited only by the explanation that has been made.

Exam. Peterson: Are they also shown on number 2 of the map?

Mr. Fiddes: We want to get some idea of the territorial extent.

Mr. Boyle: I am not trying to prompt him.

Mr. Fiddes: May I make this suggestion, if Mr. Noble were to take exhibit 5 which contains such documentary proof that he proposed to offer here as to shipments prior [fol. 237] to July 1st, by going down it, we can call off the towns of which he is still offering documentary proof.

Exam. Peterson: Yes.

Mr. Fiddes: As he does it we can locate them geographically on the map and gain some idea of the territory now.

Exam. Peterson: So that the Commission can determine the location of the towns and the number of them.

Mr. Boyle: Was your question confined to Minnesota?

Exam. Peterson: Yes, right now, Minnesota.

Mr. Van Osdel: We will come upon a North Dakota shipment occasionally.

Mr. Boyle: What you are asking the witness to indicate are the towns in Minnesota and assuming that is exclusive of the Twin Cities?

Exam. Peterson: I want to know all the towns in Minnesota.

Mr. Boyle: All right.

The Witness: Well, I did not like to commit myself.

By Exam. Peterson:

Q. What you have proved?

A. I will say that our proof is limited, and practically negative, as to the towns of Saint Cloud, Sauk Center, Brainerd, and Wadena.

Q. What documents have you in support of any shipment that moved on July 1, 1935 and prior thereto? That is what we are seeking. There are a certain number of towns that you actually served and have proof for?

[fol. 238] Mr. Van Osdel: You can do it this way: If you take Exhibit 5 and start on the first page, as you go down you can name a town as you come to it on which you have proof, documentary proof indicated by the exhibit. As you name each of those towns we will be able to put them down at this stage of the proceeding and gain some idea of the territory. Mr. Examiner, I would like to make this statement that I think it will be helpful for Mr. Noble, taking into consideration the items that we covered yesterday from my cross-examination plus the towns that were named by applicant's counsel this morning, and I can tell you there is only one shipment that is at all in issue, or that would be left out of the balance, and that is shipment fourth from the top of page 18. That is the only one.

Mr. Boyle: The fourth from the top of page 18?

Mr. Van Osdel: Yes, it will be helpful to Mr. Noble in checking.

Mr. Boyle: Do you mean Grand Forks?

Exam. Peterson: That is as far as North Dakota is concerned?

Mr. Van Osdel: That is as far as both North Dakota and the State of Minnesota is concerned. That is what I called yesterday item number 16. Mr. Noble testified he couldn't say that that stopped off at the Twin Cities. There was just as much reason to believe that it might have gone on to Grand Forks. I am going to question him further on that. I feel it did stop at the Twin Cities.

[fol. 239] The Witness: Which one is that on? Page 17?

Mr. Van Osdel: 18, fourth from the top. You called it number 16. I think Mr. Fiddes' idea is a good one. I thought this might be of assistance when he is checking through it as we go along from page to page. That is actually the only shipment left on which there is any controversy

Exam. Peterson: If there are any others let the witness name them.

Mr. Van Osdel: Yes.

Mr. Fiddes: What we want to find out is if his claim been altered by the proof given?

Mr. Van Osdel: Let me see. Of course, there is also this big double shipment on page 7, the fifth one from the top of the page called item 20 which there is a little bit of a dispute about.

The Witness: What is your reaction to the item on page 22, about the fourth down?

Mr. Van Osdel: Those have not been covered at all.

The Witness: They stand. The only point I am getting at is I am perfectly willing to concede these towns because of the fact we have not made any shipments. It may be our documentary proof has not been sufficient to show shipments to these towns. As far as tending to withdraw the territorial applications for the particular area I am not interested in doing that. We are willing to show that the particular towns involved which were,—I believe the towns [fol. 240] you had were Fargo and three other towns.

Mr. Boyle: Detroit Lakes.

Mr. Van Osdel: I can appreciate Mr. Noble's position. There is some question still about Detroit Lakes.

Exam. Peterson: Off the record.

(Discussion off the record.)

Exam. Peterson: On the record.

By Exam. Peterson:

Q. Mr. Noble, state on the record?

A. We expect to show documentary proof for Winona, Rochester, Faribault, Mankato, Redwing, St. Paul, Minneapolis and Detroit Lakes, in Minnesota, South St. Paul.

Mr. Fiddes: Were those in Minnesota?

The Witness: Comprising Minnesota, Grand Forks, North Dakota, prior to July 1, 1935.

Mr. Boyle: I understand none of this questioning is raised to anything subsequent to July 1, 1935?

Exam. Peterson: On July 1, and prior thereto.

Mr. Boyle: July 1, '35 and prior thereto?

Exam. Peterson: Yes.

By Exam. Peterson:

Q. Now, Wisconsin.

A. We claim complete coverage.

Q. You claim?

A. We are offering documentary proofs for any place in Wisconsin.

By Mr. Fiddes:

Q. The whole state?

A. The points that we show on the map of exhibit 2, [fol. 241] prior to July 1, with the exception of Green Bay and DePere. The map is self explanatory as to that.

Mr. Van Osdel:

Q. We would rather have your testimony.

A. We will omit the testimony. The map is self explanatory as to what we claim.

By Exam. Peterson:

Q. There are no other towns besides those shown on the map?

A. No, the map gives the points where we claim we were prior to July 1, for which we show documentary proof.

Q. Have you documentary proof here?

A. We think we have.

By Mr. Boyle:

Q. It appears in the exhibit?

A. Yes.

Mr. Mattimore: I don't think he compared this.

The Witness: That is to be determined later.

Exam. Peterson: Who is going to determine it?

The Witness: We have prepared this off the bills of lading. If some one can find where there is an error we are willing to discuss that error. If, however, the assumption that we are working on is correct that the map lists the points which we have bills of lading to prove, why the map is correct.

Mr. Boyle: It is correct.

The Witness: It is correct.

By Examiner Peterson:

Q. All those in black squares?

A. All those in black squares, yes, sir.

[fol. 242] By Exam. Peterson:

Q. Very well.

Mr. Fiddes: I would like to ask another general question.

Exam. Peterson: By the way, just a minute.

By Exam. Peterson:

Q. I want to come to Iowa, too.

A. The map stands for Iowa as well.

Q. Yes, Mason City, Sioux City, are the only points there on the map on exhibit number 2?

A. That is correct.

Q. Now, in Illinois?

A. The map stands correct, too, as indicative of our operations in Illinois.

Exam. Peterson: Very well, all right Mr. Fiddes.

Mr. Fiddes: As I understand, what has taken place this morning in the record, the applicant has withdrawn that portion of exhibit 5 which purports to reflect documentary proof of operations by the applicant respecting the points of Sauk Center, Waseca, Wadena, Brainerd, Saint Cloud, Montevideo, Fergus Falls, Breckenridge and Worthington.

Mr. Boyle: That is not exactly correct. I thought we were clear on that. The applicant has withdrawn nothing, but has modified the exhibit to the extent of explaining that where it purports to show a through service by Noble to those particular destinations, the documentary proof we are able to offer only will show service by Noble up to Twin Cities, South St. Paul, St. Paul and Minneapolis; and beyond, we can't prove movement by Noble. I think it amounts to the same thing.

[fol. 243] Mr. Fiddes: It amounts to the same thing, if you can't prove it.

Mr. Boyle: Honestly so.

Mr. Fiddes: Yes. You amend that exhibit orally by withdrawing that portion of the exhibit which purports to offer proof that he carried it to Brainerd?

Mr. Boyle: Yes, if you want to put it that way.

Mr. Fiddes: I think we understand each other plain enough.

Mr. Boyle: Yes.

Mr. Fiddes: Let me state there: on the basis of the amendment of proof the applicant now claims as to Minnesota prior to July 1st, he serviced the towns of Winona, Rochester, Faribault, Mankato, Redwing, South St. Paul, St. Paul, Minneapolis and Detroit Lakes.

Mr. Boyle: That is all interstate.

Mr. Fiddes: That is all interstate. And the town of Grand Forks, North Dakota. Now, the discussion we were having today with reference to the applicant's proof he submitted of operations prior to July 1st, I would like to know whether the claim as the applicant has amended it is altered by any proof offered in exhibit 6 as to operations conducted between July 1st and November 15th?

Exam. Peterson: That is what I want to ask him to also name the points that he has documentary proof of here, what points in Minnesota. Begin with Minnesota. We just had Faribault.

[fol. 244] Mr. Boyle: Wait a minute. Do I understand now we are going to be permitted to go into the shipments moved after July 1, 1935?

Exam. Peterson: We want to develop that. Not as to convenience and necessity, but continuation of the operation and also in connection with the determination——

Mr. Boyle: Let us take, for instance, Brainerd, admittedly proof will show Noble's service prior to July 1, 1935, only up to South St. Paul. Movements from South St. Paul and beyond to Brainerd made possibly by some other carrier. Certainly we are not able to establish that Noble did it. Now, if it should develop that after July 1, 1935, he actually served any of these points direct, do I understand that we are to be permitted to go into that?

Exam. Peterson: I think the Commission would like to have all the information not connected with convenience and necessity, but that the applicant is claiming here territory, and if he has a territory instead of these particular points named, why the Commission would like to know what other points.

Mr. Boyle: I rather gather from the ruling yesterday we would be limited to destinations and to shipments to specific points on and prior to July 1, 1935, and anything to those

same points that is continuity of operation and would not be permitted to go into any new points that we served after July 1.

Exam. Peterson: The Commission would like to know [fol. 245] what points they have served, but not in connection with convenience and necessity. The Commission would like to have a clear record as to just what points are served. In case the Commission should give your applicant the territory, why, the Commission would like to know what points were served prior to July 1, 1935.

Mr. Boyle: Maybe I do not exactly understand what would be construed to be the delimitation of proof under what they call the grandfather proof. We purposely have prepared these exhibits to show subsequent shipments to many points that were not served prior to July 1, 1935.

Exam. Peterson: Yes. There might be some point, for example, close, very close to another point; and if you have a territory, the Commission may figure, well, even though you did not serve it prior to July 1, you served it afterwards. It is within the territory and no proof of convenience or necessity and no testimony with respect to the applicant's fitness and ability or financial standing need be introduced for that purpose.

Mr. Fiddes: Let me make myself plain. Mr. Boyle said he understood he was not allowed to go into that. The fact remains that exhibit 6 has been offered, as I understand, and received in evidence subject to our objections.

Examiner Peterson: Yes.

Mr. Fiddes: That exhibit does go into operation. It offers what, on the face of the exhibit, now appears to be [fol. 246] proof that between July 1st and October 15th, Mr. Noble did haul into certain of four towns. We have discovered by cross-examination, the voluntary limitation that the proof as to certain of these towns which was offered in support of the exhibit 5 was not sufficient in the applicant's own estimate to bear out the claim made for it in exhibit 5. In the evidence it was amended so that we would understand it did not purport to be evidence of that.

Exam. Peterson: Yes.

Mr. Fiddes: What I want to know is does that limitation likewise apply to the next few months following, or not?

Mr. Boyle: I get your point. Off the record.

(Discussion off the record.)

Mr. Boyle: On the record.

By Mr. Boyle:

Q. What is the answer?
A. The answer is yes.

Mr. Boyle: The witness answers yes. That is my understanding. The same explanation I have given you as to exhibit 5 prior to July 1 applies to the next period of what you asked as to those towns—the same question and the same answer.

Mr. Van Osdel: Just one question, counsel: That refers to the towns that you mentioned. Does it also refer to the towns that I had just mentioned?

Mr. Boyle: I was just going to state we would connect that right up as soon as we got through these towns. That disposes of your question as to those towns for that period? [fol. 247] Mr. Fiddes: It is plain to me if it is plain on the record. To make it absolutely clear in the record let me say that I understand that Mr. Noble now claims that his documentary proof will establish operations as of the period prior to October 15, 1935 into only the following towns in the State of Minnesota: Winona, Rochester, Faribault, Mankato, Redwing, South St. Paul, St. Paul, Minneapolis and Detroit Lakes. As to North Dakota, the town of Grand Forks. Am I correct in that understanding?

The Witness: Yes.

Mr. Fiddes: Off the record.

(Discussion off the record.)

Examiner Peterson: Now, is there a single point in Minnesota besides the nine points already named where you claim that you hauled directly in your own trucks besides these points?

Mr. Boyle: What period?

Mr. Fiddes: Prior to October 15th.

Exam. Peterson: Prior to October 15th, between July 1st and October 15th. These nine towns prior to July 1st, July 1st and prior thereto. Now, is there any other?

Mr. Boyle: These nine towns he is getting at now prior to October 15, 1935.

Exam. Peterson: And also prior to October 15?

Mr. Boyle: It naturally would be.

Exam. Peterson: Are there any additional points?

Mr. Boyle: In other words, there was no change in the [fol. 248] condition during the few months between July and October 15th, 1935.

Exam. Peterson: Yes.

The Witness: I believe it shows Duluth, Minnesota, from Mason City, Iowa, if I am not mistaken. The records would speak for which towns.

Mr. Boyle: Substantially there were no changes.

Mr. Fiddes: Off the record.

(Discussion outside the record.)

The Witness: I would add Austin, Minnesota.

Mr. Boyle: We have had a short discussion off the record, in order to save time and get things clarified. Let the record show, if you please, that in addition to the towns enumerated by Mr. Fiddes in Minnesota and North Dakota, that the witness claims he has documentary proof for on and prior to October 15, 1935, and after July 1, 1935, there should be added the town of Duluth, Minnesota, to which a shipment was made by Noble in his own trucks on August 10, 1935, from Mason City, Iowa, the shipment being cheese shown on page 14 of exhibit number 6, and the shipment shown as canned goods which consisted of pork and beans in cans from Blue Island, Illinois to Austin, Minnesota, August 21, 1935, shipment by Libby, the consignee being Swift & Company. That shipment appears at page 13, of exhibit 6.

Examiner Peterson: On the record now. Exhibit number 2 is not entirely clear, because the circle shows you got [fol. 249] principal points on truck routes.

Mr. Boyle: When you get to the circle, Mr. Examiner, I thought we would explain. If not, I want to say that the circle points are keyed into exhibit number 3. Those points of the car routes, are, as far as the circle is concerned in exhibit number 3 a part of the map, just the same as if we had added to the map all the points shown on exhibit 3, as it would have been physically impossible to have it legible and at the same time a map that you could use for this purpose.

Exam. Peterson: Are there any points in exhibit number 3, as far as Minnesota is concerned, to which your truck did not operate?

Mr. Boyle: Wait a minute.

Exam. Peterson: On No. 3, by the way—Minnesota is not shown on number 3?

Mr. Boyle: No, that is Wisconsin.

Exam. Peterson: That is Wisconsin?

Mr. Boyle: Yes.

Exam. Peterson: So, you do not have a similar exhibit for Minnesota?

The Witness: No.

Mr. Boyle: No car routes in Minnesota that we serve.

Exam. Peterson: Well, are there any points in Minnesota that you began serving after October 15, 1935 besides—yes, that you began serving?

[fol. 250] The Witness: After October 15th?

Exam. Peterson: Yes.

The Witness: Yes.

Exam. Peterson: You have shown here nine points: Winona, and Rochester, on and prior to July 1, 1935, then you have also shown Duluth and Austin, between July 1 and October 15, 1935. What other towns were added after October 15, 1935?

Mr. Boyle: In Minnesota?

Exam. Peterson: In Minnesota.

The Witness: Well, we can develop proof after, but you are not interested in after, are you?

By Exam. Peterson:

Q. You have stated here that you claim a territory and the Commission would like to know what points you have served?

Mr. Boyle: We admit we have not the documentary proof any more than has been set up prior to July 1, 1935 and October 15, 1935. I didn't understand you would hear us at all on any detail of the operation to any new point served after October 15, 1935. We have all of that. We would be very glad to show it to you.

Exam. Peterson: I think the Commission would be glad know what points.

Mr. Boyle: That has been my thought, too.

Exam. Peterson: Not as convenience and necessity. That is only in case the Commission should find you have a territory and they want to know and get the whole picture.

[fol. 251] Mr. Boyle: As long as it is in we can all argue the purpose that it serves. Suppose we argue then what use is to be made of it?

Exam. Peterson: There might be some points surrounding the points of Winona, Rochester, Faribault and so forth. There might be some points close, so that the Commission might say these points are within the territory, in a certain territory, but not as broad as the applicant claims. I don't know just what the Commission is going to do about it. I think the Commission would like to have a clear picture of the operation up to date.

Mr. Boyle: That is what we have endeavored to do, both on the map, and a key which we have attempted to mark to show the points served prior, on and prior to July 1, 1935, and October 15th, 1935 and subsequently thereto. Then, of the exhibits that we have filed you have already discussed number 6, but number 7 and 8 deal with the years 1936, 1937 and there is number 9 here, too. Number 9 deals with the year 1938 and shows a representative operation during that period; and that, of course, is going to show those Wisconsin points that are indicated only by the circle key of the map because we were serving all of those car routes to the local points on those routes.

By Exam. Peterson:

Q. I understand your exhibit No. 2, I believe.

A. On exhibit number 2 we wouldn't be able to show docu- [fol. 252] mentary proof of movement after October 15, 1935, from points in Minnesota which are Detroit Lakes and Marshall. In seasonal movements in October, November and December during the time that poultry and produce is moving, we would show a seasonal movement in interstate to points to Wisconsin and Illinois.

Q. After October 15th?

A. After October 15th.

Q. That is what the Commission would like to have.

A. In other words, we were interested in these towns only for the seasonal movement for Swift & Company to move this poultry and produce at rush times.

Q. You did not do that before October 15th?

A. We were not in business the year prior.

Q. You did not do it before October 15th, 1935?

A. No, we were not in business at that time.

Mr. Boyle:

Q. You say the business started in November, 1935? By the time you started the season was about over, wasn't it?

A. That is a seasonal movement in December.

Mr. Edell: Started when?

The Witness: The months of November and December.

By Exam. Peterson:

Q. You were not in business?

A. No. We just started in business in November, 1934, so we couldn't have been in the seasonal operation prior to October, 1935.

[fol. 253] Q. You actually served points in Minnesota?

A. After '35 we have served in the seasonal movement in November and December, shipments originating at East Grand Forks, Detroit Lakes, Marshall, Montevidio, Waseca and I believe New Ulm.

Q. When did you start the operation of your business? When did you start?

A. November, '34.

Q. November '34?

A. Yes.

Q. The seasonal movements begin the first of November?

A. The seasonal movements begin the first of November.

Q. And last how long?

A. Until after Christmas.

Q. Did you?

A. We were not engaged in the seasonal movements prior to October 15, 1935, principally because we had just made our contract with Swift, November 1, 1934, and no big corporation takes you right in their hands to begin with.

By Mr. Fiddes:

Q. You were only operating two trucks at that time?

A. I was only operating two trucks at that time.

Examiner Peterson: That is what the Commission would like to find out. Those seasonal movements were from what points to what points?

Mr. Fiddes: Before he develops it for the sake of the [fol. 254] record I want to note an objection to evidence of

operations which, on the state of the record clearly were not begun prior to October 15, 1935.

Examiner Peterson: Oh, well, the Commission would like to have that information developed.

Mr. Fiddes: Possibly so. I say I wish my objection to be noted prior to the development of it. I would argue it was not properly admissible; that no grandfather rights could be given upon it.

Examiner Peterson: That is right.

Mr. Fiddes: I do not wish to sit here and be supposed to be agreeing to the proposition that it was proper to prove grandfather rights. If my objection is overruled I wish an exception noted.

Examiner Peterson: Yes. He claims that it was seasonal; that he made preparation for seasonal operations, but had not actually started in this seasonal business until after October 15th.

Mr. Fiddes: I realize that.

Exam. Peterson: Now, the question for determination by the Commission would be whether preparing for such an operation amounts to grandfather rights. I would like to have what he did after October 15th.

Mr. Edell: He didn't say he had prepared for the seasonal operation prior to October 15th, 1935.

[fol. 255] Exam. Peterson: Let us get the record straight.

The Witness: My statement is we have made these movements in a seasonal manner since October 15, 1935; that we were not in a position to be offered these movements prior to October 15, 1935, because we were not in business.

By Mr. Van Osdel:

Q. So you did not necessarily make any preparation, did you?

A. No, we have moved them believing they were within the scope of our application, in the territory serving Swift & Company, within the territory asked for.

Q. Mr. Noble, I do not believe the Reporter got your answer, and I ask you if you did not make any operations prior to October 15, for that particular shipment? Did you?

A. That is correct.

Q. Your answer is no?

A. Yes.

Mr. Fiddes: My point is, there are carriers who were hauling it in '34 and '33 and they have grandfather rights. I am merely objecting to this man's efforts to gain them.

Exam. Peterson: Your objection is to his claim of grandfather rights in connection with such irregular operation. It is more in the nature of an argument.

Mr. Fiddes: No. If in my opinion it does not tend to prove grandfather rights, then it is not material. That is my ground for the objection. It can be overruled.

Exam. Peterson: Objection overruled. The applicant [fol. 256] takes the position it tends to prove grandfather rights. That is for the Commission to determine.

Mr. Fiddes: I see.

Exam. Peterson: All right.

By Exam. Peterson:

Q. As the applicant, Mr. Noble, will you state now again on the record the points in Minnesota that you began serving after October 15, 1935 and the dates?

A. East Grand Forks, Detroit Lakes, Marshall, Montevideo, Waseca, New Ulm. That covers it.

Q. That is all?

A. Yes—Sauk Center.

Q. Those shipments moved beginning in November?

A. They would move in the fall, in November.

Q. In the fall?

A. More specially prior, immediately prior to Thanksgiving and Christmas.

Q. They moved to what points?

A. They would move to Green Bay, Fond du Lac, Oshkosh, Milwaukee and Racine.

Q. What other point?

A. Milwaukee, Racine, Kenosha and Chicago.

Q. Well, did the shipments from East Grand Forks move to all of those points, destinations?

A. You see that would be supplies for Thanksgiving business coming out of one of these produce houses that we take the shipments for to Green Bay, Fond du Lac, Oshkosh, and [fol. 257] another shipment may start out from Detroit Lakes to Milwaukee.

Mr. Fiddes: Just a moment. Are we getting the description of what he claims or sets up for an operation?

Exam. Peterson: What he claims he did, what he claims the documentary proof to be.

Mr. Fiddes: This statement that a truck might have moved is not offered in the record to show that it did move.

Mr. Edell: Furthermore, it should be noted that none of these exhibits cover any period during which it is alleged this seasonal movement was carried on, so that added proof will have to be submitted in order to satisfy the objectors.

The Witness: We have sent over to the office to get the records.

By Exam. Peterson:

Q. The record of these shipments?

A. I just sent somebody to get the records.

Q. They are not mentioned here?

A. They are not mentioned here. I guess I took it for granted in preparing this, I showed these various towns. I guess I just happened to omit November and December in this preparation. It just followed when we were taking the months, when we ended up those two months were not shown.

Mr. Boyle: Just an oversight in preparation?

The Witness: I thought we had sufficient evidence.

Exam. Peterson: All right, now.

By Exam. Peterson:

Q. North Dakota?

A. Fargo, North Dakota has been served subsequent to October 15, 1935.

[fol. 258] Q. From what points?

Mr. Fiddes: Are we talking about poultry, yet?

Exam. Peterson: He will state.

The Witness: Fargo has been served from St. Paul, Minneapolis and Chicago.

By Mr. Boyle:

Q. Directly by you?

A. Directly by me since October 15, 1935.

Q. A statement of that would appear on your exhibits here during the several periods?

A. From those exhibits, I believe, there will be no difficulty in clearing it.

Q. The documentary evidence is all here?

A. The documentary evidence is all here.

By Exam. Peterson:

Q. No shipments moved from Fargo, I understand?

A. No.

Q. Now, Wisconsin. Does Exhibit number 2 in connection with number 3 show all the points?

Mr. Boyle: That is right.

The Witness: They don't show, the map here would not show the points of origin out of Wisconsin at the present time. If you are interested in points of origin at the present time, is that what you would like?

By Exam. Peterson:

Q. Points of origin and points of destination?

[fol. 259] A. Points of destination—we may hit any spot in the State of Wisconsin. We do not know what we will hit tomorrow.

Mr. Fiddes: Is he talking about what he is doing now?

Exam. Peterson: What he has done.

Mr. Fiddes: New points that he has not shown before October 15th?

Exam. Peterson: Yes.

The Witness: They are too numerous to mention. We would not be able to make a list of them.

By Mr. Edell:

Q. Are they all taken in exhibit 3?

A. They are, yes, exhibit 3 merely indicates those towns that are on plant sales distribution. They would not include branch houses, fox farms or any place that might be off—that is not on the plant sales route.

By Exam. Peterson:

Q. Those fox farms, et cetera, they were not served prior to October 15th?

A. Oh, yes, we have one up here. We did not show it on this map. We have; yes, Hamburg. There is one fox farm we hit before October 15th.

Q. I understood your exhibits number 2 and 3 showed the entire operation in Wisconsin?

A. It does.

Q. Including fox farms?

A. That is correct. That shows the fox farm at Hamburg.

Q. Is there any point you have not showed on the map?

A. You understand we are circling—this map was developed first as to points served prior to July 1, 1935; the [fol. 260] triangle showing additional points served from July 1st to October 15th; the combination of the triangle and the square bringing the operation up to October 15th, with the addition of our routes, of truck routes, truck irregular routes being developed after that time, and at the present time we are serving those plant sales routes which are shown so circled on the map. Now, those towns are listed in that appendix, 3.

Mr. Boyle: 3.

The Witness: Appendix 3.

By Exam. Peterson:

Q. Exhibit number 3?

A. In addition to the towns listed in exhibit number 3, there are such towns as Green Bay, Oshkosh, Fond du Lac, Milwaukee, Racine, Kenosha, Waukegan and Thiensville, Wisconsin, Niagara, Wisconsin and points that are not regularly offered Swift service that might be served by us at the present time. I couldn't name the towns.

Q. In what part of Wisconsin are they located?

A. They could be any place in Wisconsin. If Swift & Company told us tomorrow to take this load over in this territory, in this town we would be taking it over there. It would be on some truck. We are covering the state sufficiently broad at the present time that we have a truck—with the exception of the area in the northwestern part of Wisconsin, we have trucks covering the entire area, with the exception of the northwestern portion of Wisconsin.

[fol. 261] Q. How about the southern part of Wisconsin?

A. That we cover thoroughly.

Q. Since October 15, 1935?

A. Yes.

Q. Prior to that you didn't?

A. We covered it in an irregular operation hitting any of these break bulk points as we have mentioned prior in our direct examination.

Q. Prior to July 1st there were only a comparatively few points?

A. I think twenty-two points.

Q. Twenty-two points in Wisconsin?

Mr. Fiddes: I take it this oral testimony as to what he did prior to July 1st is not to extend the documentary proof?

Exam. Peterson: No.

Mr. Fiddes: It is of very general nature. We are not objecting. We are assuming he is relying on the documentary proof and not on what he is now saying?

Exam. Peterson: Yes.

By Exam. Peterson:

Q. Now, Iowa.

A. At the present time we would show operations after October 15 to those towns serviced prior to October 15th, plus the addition of Algona, Iowa, Iowa Falls, Waterloo, and towns listed on the appendix to the map designated by Route 67, circled with 67, enclosure, in the northeast corner of the State.

By Mr. Mattimore:

Q. When did you start Route 67?

[fol. 262] A. That was started in August, 1937.

By Mr. Boyle:

Q. Mr. Noble, when you were giving the list of towns in North Dakota, you would serve direct now and have served direct in periods after October 15, 1935, I didn't know whether you mentioned Grand Forks?

A. I serve Grand Forks at the present time and have served after October 15, 1935.

By Mr. Van Osdel:

Q. When you were mentioning, Mr. Noble, towns which you served after October 15, 1935, you mentioned the town of Fargo. The reason you did not mention Grand Forks was, you mentioned towns you started after October 15th, and you, of course, had started Grand Forks before that?

A. That is right.

By Exam. Peterson:

Q. Are you still serving Grand Forks?

A. Still serving Grand Forks.

By Mr. Mattimore:

Q. Isn't that the exact date that you commenced serving Fargo, on October 15th?

A. I said after.

Mr. Fiddes: I take it he means, when he says, "I served since October 15th" that he started to serve on the date reflected by the documentary proof.

Mr. Boyle: That is correct.

By Exam. Peterson:

Q. Mr. Noble, you referred to the northeastern corner of Iowa?

A. Yes.

Q. That you are serving at the present time or began to [fol. 263] serve after October 15, 1935?

A. Yes.

Mr. Boyle: That is that one car route.

By Exam. Peterson:

Q. On what, can you state on what route that is, north of what highway?

A. That would be north of — I think we had that highway.

Mr. Boyle: That is Iowa.

The Witness: This particular route would be north of U. S. 30. In fact, even further north, State Highway 10.

By Exam. Peterson:

Q. And east of what route?

A. East of the river.

By Mr. Boyle:

Q. East of the state line?

A. East of the state line.

By Exam. Peterson:

Q. East of what river?

A. Mississippi river.

Q. West?

A. West, I beg your pardon.

Q. East of what line?

A. East of——

Q. West. Yes, east of what?

A. East of U. S. 63.

Q. Now, Illinois. Sioux City is shown on the map in exhibit 2?

Mr. Boyle: Yes.

Exam. Peterson: Just name the particular towns. He says the northeastern corner.

[fol. 264] By Exam. Peterson:

Q. Now, Illinois.

A. Our operation at the present time in Illinois——

Q. After October 15th?

A. After October 15th would reflect the same operation as prior to October 15th with the addition of plant sales deliveries in the area designated as 61, route 61.

Q. U. S. 61?

A. No route; your car route, not highway. Plant Sales Route 61 and the towns of Freeport, Illinois, LaSalle, Illinois.

Q. Well, the car route 61, what points are on it?

A. That is listed in the appendix.

Q. Appendix exhibit——

A. Exhibit 3. That is the appendix to the map.

Q. That is all Wisconsin, is it?

A. No. That is Illinois. Harvard, Illinois is the breaking point, see.

Q. Will you please show that, what page. I see you have, on page 2?

A. 61 is right alongside the name Harvard here.

Q. Yes.

A. And takes in such towns as Harvard, Hebron, Richmond, Woodstock, Garden Prairie and Big Foot Prairie.

Q. That is all?

A. Alden, Illinois, Chemung, Greenwood, Hartland, I mean the points we were serving, points we served, prior to and in addition to these points.

[fol. 265] By Mr. Boyle:

Q. You have mentioned Ottawa as one of the points?

A. Ottawa. I mentioned LaSalle, Waukegan, North Chicago, Blue Island.

By Exam. Peterson:

Q. Blue Island?

A. Blue Island, Illinois.

Q. Now, do you claim you have documentary proof showing that you hauled all these shipments in your own truck?

A. Yes, sir..

Q. To all these points?

A. Yes, sir. That is after October 15, 1935?

Q. Yes, after?

A. Yes.

Q. I think the Commission would also like to know what the general commodities consisted of. Beginning with the points in Minnesota you named Winona, Rochester, Faribault, et cetera. Are there some shipments to those points which you show in your exhibit as consisting of general commodities?

A. The only place which would have involved any general commodities out of and as an inbound movement would be the point of Winona.

By Mr. Boyle:

Q. An inbound movement from where?

A. From East Chicago to points in Wisconsin.

Q. To Winona?

A. That would be a list of general commodities.

By Exam. Peterson:

Q. Will you go through your exhibit where Winona is [fol. 266] shown and see if you have listed any shipment as consisting of general commodities?

Mr. Van Osdel: For what period, Mr. Examiner?

Exam. Peterson: Beginning with July 1, 1935 and prior, thereto.

Mr. Boyle: I find, I haven't all the places where Winona is shown.

The Witness: I wonder if I can get the other folder?

By Mr. Van Osdel:

Q. Which one?

A. From January to July, inbound. Well, here is one to start with. I think that is listed as printed matter, the

list on exhibit 5, page 7, would show a listing from Winona to Chicago as printed forms. The bill indicates printed forms. The bill of lading indicates printed forms.

By Exam. Peterson:

Q. What item is that? What was the date of the shipment?

A. Dated January 5, 1935.

By Mr. Van Osdel:

Q. What page?

A. Page 7.

By Exam. Peterson:

Q. Wait a minute, please. 7?

A. Yes, exhibit 5, page 7.

Q. Oh, I see.

A. Then, we also—just a minute.

Q. Just a minute, I want to get this one. What is the date of the shipment you say?

A. January 5, 1935, where we list one bill of lading as printed forms. That is down below. This printed bill of [fol. 267] lading shows printed forms. Now, the next item right below it shows general commodities. The bill of lading calls for twelve alligator castings, bottle corks, mail tubes, drums of oranges——

By Mr. Van Osdel:

Q. To Winona?

A. To Winona. Register tickets, gate lock, tag fast. This is signed for by the Interstate Packing Company in Winona, Minnesota. Do you want another?

By Exam. Peterson:

Q. Yes. All those you have show general commodities. I want to see what those general commodities consisted of.

By Mr. Boyle:

Q. You have one on January 9th.

A. Now, here we have one on January 9th.

By Exam. Peterson:

Q. On what page?

Mr. Boyle: Page 7.

The Witness: Trisodium, soap, toilet paper, bolts and files, pail covers and bags of paper.

By Mr. Fiddes:

Q. Received by the Interstate Packing?

A. Received by the Interstate Packing, signed shipper. That is January 9th.

Mr. Edell: Off the record.

Mr. Boyle: I was going to ask him about the shipment on January 25th, 1935 to Winona.

Examiner Peterson: What page?

The Witness: That is on page 8.

By Mr. Fiddes:

Q. To whom it was delivered to?

[fol. 268] A. This was delivered to the Interstate Packing, although the bill reads it should have been delivered to Hodgins Packing Company.

Q. They are the ultimate—or ultimately the articles were to be delivered to the Interstate Packing?

A. It is signed Interstate Packing, which indicated we probably delivered it directly south.

Mr. Boyle: We are still talking about what?

Examiner Peterson: July 1st.

The Witness: We are merely identifying the bill. This has on it one case of canned goods, a box of spice.

Examiner Peterson: Just a moment. I want the record cleared up. You say this is listed on page 8 of exhibit 5?

The Witness: Yes.

Examiner Peterson: Is there any shipment there that moved on July 1 and prior thereto?

Mr. Boyle: That is January 25th, 1935.

The Witness: That is January, 1935.

Examiner Peterson: I have exhibit number 6. All right.

The Witness: Then I think I gave you canned goods, box of thermometers, 59 bundles of cards; that has been listed as a shipment of general commodities.

By Mr. Boyle:

Q. How about February 4, 1935?

A. This is a shipment out of Chicago to the Interstate Packing Company, signed for by the Interstate Packing Company, containing extension lights, warning signs, ammonia, keg of steel skewers, which has been listed as gen-
[fol. 269] eral commodities.

By Examiner Peterson:

Q. What page is that?

A. Page 9.

By Mr. Boyle:

Q. February 15, 1935, page 10?

A. Here is a billing from Swift & Company, Chicago, to the Interstate Packing House at Winona, Minnesota, signed for by A. Williams, including a paper box of empty conts. bags of asphalt, coil of rope, four cylinders of ammonia, a paint pail.

Q. A pail of paint?

A. Tires from the Goodyear Tire Company, liquid glue, sheep casings, cartons, lard substitute, tags, four bars pig lead, a package of overalls, bale of cotton rags, roll of wire rope, cotton yarn, bundle of hooks, bags of cake meal, bundles of cartons. Those items are listed as general commodities.

Mr. Boyle: Shall we continue with this, Mr. Examiner? I think you find that we are apt to have almost any commodity in any of those.

Mr. Mattimore: I think we are willing to admit it.

Examiner Peterson: All right.

Mr. Fiddes: You are through?

Examiner Peterson: Yes.

Mr. Fiddes: I understand that Mr. Van Osdel who had finished his cross examination after we adjourned yesterday has a few more questions.

Mr. Boyle: Have you finished?

Mr. Fiddes: I have not started yet.

[fol. 270] Mr. Van Osdel: It is immaterial to me, Mr. Examiner. Mr. Fiddes only thought that a great deal of this examination on towns in Minnesota had been disposed of by counsel's statement. I have a few that I missed yester-

day, and rather than go into new phases of the case now, it might be well to dispose of them here.

Examiner Peterson: All right.

Mr. Fiddes: Specific towns.

Examiner Peterson: Yes.

Mr. Van Osdel: It won't take more than fifteen or twenty minutes.

By Mr. Van Osdel:

Q. Mr. Noble, speaking of exhibit 5, which is the one from November 17, 1934 to July, 1935, I notice at the outset on the front page it says "Summary of representative freight bills." I note in some of your later exhibits they are a summary of representative freight bills. This one has all of the freight bills, has it not?

A. No, sir.

Q. Well, so far as the territory I am concerned with and the towns I have been questioning you about in Minnesota and North Dakota, is it all of the freight bills?

A. I would say no. I would not be able to produce those all.

Q. Yes.

A. This is all the records we have of that period.

Q. This is a full summary of the original records that you have had for us for inspecton?

[fol. 271] A. This is a summary of the freight bills that we have produced for you.

Q. Exhibit number 5 is all of the freight bills that have been submitted for our inspection?

A. Unless there is some error.

Q. Unless there is some error?

A. Yes.

Q. So the word "representative" does not mean like it does in Exhibit 5, like it does in some of your later exhibits, that it is one out of a hundred shipments, anything like that?

By Mr. Boyle:

Q. As to your points?

A. I would say that that would be pretty general, all we actually had an opportunity to do in your territory; we haven't had time enough——

By Mr. Van Osdel:

Q. To get going?

A. That is it.

Q. I slipped up on one shipment, Mr. Noble. That is the Fargo shipment. You can find it on page 8 of exhibit 5. It is about the twelfth down from the top.

A. Beginning from the top?

Q. Yes, January 22nd, 1935, Swift & Company, Chicago, Illinois, to Fargo, North Dakota of canned meat. I shall call that shipment number 21, and ask you to find that for me in the originals?

A. We will concede that along the line of the questioning that you had previously.

[fol. 272] Q. So, without any more ado, that is a shipment that went from Chicago to the Twin Cities, is that right?

A. We will assume that is correct.

Mr. Boyle: That was handled by Noble & Company only to the Twin Cities. We can't show proof beyond.

Mr. Van Osdel: All right. Your counsel this morning named some shipments or rather some towns that appeared in exhibit number 5, and I have checked through that and find that some of them are not there. I imagine that is a mistake. I possibly should have asked your counsel with reference to the town of Sauk Center. You said there were some shipments on pages 7, 13, 14, 15, 18, 20.

Mr. Fiddes: He said he was withdrawing those.

Mr. Van Osdel: He is withdrawing shipments at Sauk Center as represented by 7, 13, 14, 15, 18, 20, 21 and 22.

Mr. Boyle: You see what I did? Off the record.

(Discussion off the record.)

Mr. Boyle: Counsel has kindly called my attention to an oversight of mine in making that statement this morning in giving page references to several towns, particularly Sauk Center, Minnesota. That town appears in exhibit 5, so far as I know, only on pages 7, 13, 21 and 22. Waseca, Minnesota appears on pages 8, 12, 13, 14, 15, 18 and 20. If I said otherwise it should be corrected. My mistake is in reading something above the line and below the line.

Mr. Van Osdel: Just a question to counsel for applicant. [fol. 273] I noted also in several of these towns where you would say, for example, Montevideo, page 14, I would find more than one shipment.

Mr. Boyle: That is correct. I have a note here of two. You may find on those pages that the town is mentioned more than once. If so, the statement is to be read in connection with each app-arance of the town on that sheet.

Mr. Van Osdel: Let me ask.

By Mr. Van Osdel:

Q. Now, Mr. Noble, if you will get before you exhibit 5, if you have it we will talk about two items. I call them item 16 and item 20. It doesn't make any difference which we take up first. Take up item 16 which is on page 18. It is the fourth one down from the top. May 11, 1935, Derby, Cheiago, Illinois, to Grand Forks, North Dakota, canned goods. Do you have that before you?

A. Yes, sir.

Q. Now, I wonder if you can find for me the original record. I had it in one of those files. Now, you have it before you, Mr. Noble, the original record?

A. I have.

Q. If you will recall, in fairness to you and myself, you said that was the shipment that you couldn't necessarily say you had hauled it to Grand Forks, but at the same time you couldn't say you had ceased hauling it at St. Paul?

A. In checking this now I would be inclined to think it stopped at St. Paul, due to the fact I have made a notation [fol. 274] there is 41019 pounds, which would indicate that would be the rate to St. Paul.

Q. So after further examination it appears that is in the group with the others; that so far as the documentary proof is concerned it stopped at St. Paul and did not go to its final destination?

A. That is correct.

Q. If you will go to what we have termed item 20, that is to be found on page 7, I believe you will find the original records Mr. Noble.

Mr. Boyle: June 22nd?

By Mr. Van Osdel:

Q. Now, Mr. Noble, I am referring to what we have yesterday termed shipment number 20 found on page 7 of exhibit 5, dated June 22nd, 1935, a Swift & Company shipment from South St. Paul, Minnesota to Grank Forks, North Dakota and Detroit Lakes, Minnesota, plant sales?

A. Yes, sir.

Q. Now, yesterday I believe you told me, in explaining to the Commission why you felt the Detroit Lakes shipment might still be interstate, that it consisted of two boxes of chemicals. Am I correct when I say that?

A. Together with other items.

Q. Well, now, then at that same time you referred to another shipment, the same month, June 20th, 1935, from Chicago to the Twin Cities, did you not?

A. Yes, sir.

Q. And it was from that original record that you were [fol. 275] able to direct the deduction which I have just explained about the Detroit Lakes shipment possibly being interstate, isn't that a fact?

A. It was a fact, interstate yes, sir.

Q. Now, then, will you examine that and see if there are any other items that were destined for Detroit Lakes, as far as you were concerned, that you thereby could tell us what consisted of the shipment when it finally landed in Detroit Lakes? Now, keeping in mind, Mr. Noble, I am not interested in shipments that have proof here that are purely intrastate. I am interested in the ones that you can at least speculate on as being possibly interstate?

A. Of course, to begin with, there is an item of two boxes of chemicals. I would have to examine these very closely to tie up what their actually might be, what their actuality might be.

Q. You can appreciate all I am trying to ascertain is what the facts are.

A. Absolutely.

Mr. Boyle: Would it help you any to refer to page 22 of your same exhibit where you show an exhibit originating in Detroit Lakes?

Mr. Van Osdel: That is dairy products back to——

Mr. Boyle: On coming back to June 24th.

The Witness: I have that shipment right here.

By Mr. Boyle:

Q. It is a fact, isn't it, Mr. Noble, we be way of help. [fol. 276] that at that time, at that same time there were a number of shipments which had begun as interstate from South St. Paul to Detroit Lakes, isn't that a fact?

A. No, I would not say that.

Q. Your original records that you have show that.

A. Just a minute. We show in this one item 65 boxes of which in all probability 51 of those bundles or boxes was on the load coming in from Chicago on the 20th. This item here, in other words that was destined to Detroit Lakes, was billed out for the purpose of showing paying a through rate from South St. Paul to Detroit Lakes, it was grouped with an additional fourteen boxes of some other matters that were shipped to Detroit Lakes.

By Mr. Van Osdel:

Q. Just a minute. What does that signify Mr. Noble?

A. That would not signify anything. Here is the shipping date.

Q. That is the order date?

A. No, this is the shipping date. This would not go out on the 19th. Swift & Company could better explain that than I. I don't even know what this means.

By Mr. Boyle:

Q. What were those boxes of, Mr. Noble?

A. The bill itself is self explanatory. I would not be able to read any different than you as to what the contents were.

Q. You can appreciate that the Commission, as well as the protestants are interested in any information you can [fol. 277] give them as to what the contents are, if you know.

A. We probably could get those records in the course of time by sending to Detroit Lakes and tracing down that particular shipment.

Mr. Van Osdel: Mr. Examiner, my only thought is this: I am very fair in explaining this that prior to July 1, 1935, the applicant has one shipment which went to Detroit Lakes. That is the shipment that we are now talking about. And I think it is only fair to ascertain what those commodities were because that is upon which his grandfather rights will be based. From that illumination, I say it to be a fact that is the only shipment prior to July 1st, 1935, to Detroit Lakes. Now, in fairness to the record he does have two shipments from Detroit Lakes of dairy products and into Detroit Lakes, that is the only one.

Exam. Peterson: He had two shipments of dairy products prior to July 1, 1935?

Mr. Van Osdel: From Detroit Lakes.

Exam. Peterson: To where?

Mr. Van Osdel: To Chicago.

Mr. Boyle: Shown on page 22, exhibit 5, moved June 24, 1935, two days after the shipment that is being questioned now.

Exam. Peterson: When was the next shipment to Detroit Lakes.

Mr. Van Osdel: You mean, after July 1, 1935?

Exam. Peterson: After June 22nd, 1935.

[fol. 278] Mr. Van Osdel: I will cover that when I get to my next exhibit. That is not in this exhibit.

By Examiner Peterson:

Q. Mr. Noble, your record does not show anything about plant sales?

A. Our record shows plant sales to Grand Forks, North Dakota. In fact, the bill itself clearly indicates there was a certain amount of Swift & Company's products which were destined to Grand Forks, North Dakota, which were in actuality plant sales to be delivered on their route number 90.

Q. That consists of what?

A. Meats, canned goods, cheese, anything that might be involved in the sales of Swift & Company's business, anything that might have any form of a premium end of Swift & Company's business. It might be watches, or electric roasters, or anything that some high power salesman might have talked the customer into a big order to get a premium on. That is, it occasionally——

Mr. Van Osdel: Of course, Mr. Examiner, that is a very easy way of saying what general commodities are. Yesterday the applicant testified that he was quite sure this was an interstate case, because there were two boxes of chemicals in there. For the purpose of the record I want to know if that was chemicals. After I disclose it to the applicant the applicant is very sure there were chemicals, but there were a lot of other things, such as packing house products.

The Witness: We have a definite bill of lading as to the chemicals on this. There is no argument about that.

[fol. 279] By Mr. VanOsdel:

Q. Would you be willing to find that shipment, whether it was interstate or intrastate, and read it to counsel back on the record? Aside from that, just talking about the shipment itself, would you be willing to assist the record by saying it was chemicals, or are you going to take the position it was everything?

A. We are satisfied in calling it chemicals to Detroit Lakes, and an interstate movement.

Q. That would suffice on that one. Can you help us any on the Grand Forks shipment any?

A. I can merely state that that shipment was plant sales products delivered to Bill Whalen in Grand Forks, the commodities being the general run of commodities that would ordinarily be shipped in a movement of 1000 pounds for general distribution in the territory. It would consist of a varied line of Swift products with the possibility of items in the shipment, not necessarily having their origin in the manufacturing process of Swift & Company.

By Mr. Boyle:

Q. Does that answer the question? You haven't any more specific detailed description of the commodities than what you have given?

A. I couldn't give a specific detailed answer to that question.

By Mr. VanOsdel:

Q. I thought, Mr. Noble, that you might be able to glean some information from that record of June 20, 1935 that you had from Chicago, could you?

[fol. 280] A. Chicago items are not involved in the interstate movement out of South St. Paul to Grand Forks.

Q. Will you look at that again, please?

A. There is no question about that. I have already seen that.

Q. Well, now, I thought you made considerable of a point yesterday that those Detroit Lakes shipments in all probability were not even taken off the truck?

A. As far as we are concerned the Detroit Lakes shipments were taken off first. As far as moving to Grand

Forks we are not attempting to claim anything that went to Grand Forks came back again: a Grand Forks movement originated in South St. Paal with destination to Grand Forks.

Q. I see.

A. The items involved in the exhibit to Detroit Lakes—our contention is the chemicals originated in Chicago, moved interstate to Detroit Lakes by our truck.

Q. So that you say that your record dated June 20th, 1935, out of Chicago was confined to the Detroit Lakes shipment, is that correct?

A. That is correct.

Q. We know that Grand Forks, North Dakota was distinctly a South St. Paul shipment of different commodities.

A. That is correct.

Q. Mr. Noble, do you at the present time hold a certificate of public convenience and necessity from the State of
[fol. 281] North Dakota?

A. We have found it unnecessary.

Q. That is your opinion?

A. That is what our correspondence developed.

Q. Will you answer my question?

A. I hold no certificate from the State of North Dakota as a public convenience and necessity.

Q. Did you ever, Mr. Noble?

A. Never.

Q. Do you, at the present time, have any North Dakota license on your trucks for operation into and out of the State of North Dakota?

A. We do not.

Q. Did you ever have?

A. Yes, sir.

Q. When was that?

A. In the year 1937.

Q. But you did not have any in '34 or '35, did you?

A. No, sir.

Q. Now, then, if you wil, let us consider after July 1, 1935. Will you place before you what is known as exhibit number 6?

A. Yes, sir.

Q. Mr. Noble, your counsel at the beginning of these proceedings yesterday made a correction with respect to all save 9 towns in Minnesota, one town in North Dakota, con-
[fol. 282] cerning your proof, documentary proof prior to

July 1, 1935, and then said also that same condition existed up to October 15, 1935. May I make myself clear? I will put in this way: After your counsel this morning had made arrangements to change some of the listings in exhibit 5 in accordance with our examination yesterday he did so, but he left untouched Detroit Lakes, Minnesota shipments and Grand Forks, North Dakota shipments. Do you remember that?

A. That is correct.

Q. So far we have only treated Detroit Lakes, Minnesota and Grand Forks, North Dakota, so far as exhibit 5 is concerned which ends with July 1, 1935.

A. That is correct.

Q. Now, then, just as a preliminary statement, it is my idea to treat of exhibit number 6, keeping in mind only those who points, Detroit Lakes and Grand Forks, North Dakota, and consider the documentary proof from July 1, 1935 to October 15, 1935. So I will call your attention to that as we proceed to exhibit number 6. I will call your attention to page 2. Mr. Noble, do you have it before you?

A. Yes, sir.

Q. Will you also equip yourself with the original records on that?

A. I do not believe I have that record,—yes, sir, I have.

Q. Have you that before you?

A. Yes, sir.

Q. And that appears to be a shipment dated August 31, [fol. 283] 1935, Swift & Company, South St. Paul, Minnesota, to Detroit Lakes, Minnesota, to Breckenridge and Montevideo, Minnesota. That is the last one on page 2.

A. I have it.

Mr. VanOsdel: Off the record, gentlemen.

(Proceedings outside the record.)

Mr. VanOsdel: At this time, Mr. Reporter, I should like to have the record show the shipment dated June 17, 1935, Swift & Company, Chicago, Illinois, to Grand Forks, North Dakota, paper bags. That is found on page 20 of exhibit 5, which was changed from New Rockford, North Dakota to Twin Cities, which I have at times referred to as listing number 20. I should like to change that for the purpose of brief writing, to shipment number 20-A.

Examiner Peterson: Where you referred to Twin Cities, Mr. VanOsdel, is it Minneapolis or St. Paul? Can you tell which?

Mr. VanOsdel: I started out to make that St. Paul, South St. Paul, Minneapolis. As I recall Mr. Noble said for a matter of less confusion just to make it Twin Cities. That was your idea, was it not, Mr. Noble?

The Witness: Yes, sir.

Examiner Peterson: It might be South St. Paul, too?

Mr. VanOsdel: Yes.

The Witness: Oh, yes. That is a big plant there. The interesting part about these bill is they all say St. Paul, [fol. 284] Minnesota. Actually the big plant is South St. Paul. They have cold storage facilities at Minneapolis.

Mr. VanOsdel: Now, Mr. Reporter, on page 7 of exhibit 5, the fifth shipment down, which is dated June 22, 1935, the shipper is Swift & Company. That is South St. Paul, Minnesota, point of origin to Grand Forks, North Dakota, Detroit Lakes, Minnesota is the points of destination. I have been referring to that shipment both yesterday and today. Now, for the purpose of the record and brief we will call that 20-B.

Examiner Peterson: Why not call it 21?

Mr. VanOsdel: I have already got 21 on page 8.

By Mr. VanOsdel:

Q. Now, Mr. Noble, we will call that shipment on page 21 exhibit number 6, shipment number 22.

A. Yes, sir.

Q. And it is the last shipment on page 2.

A. Yes, sir.

Q. And it was 8-3-35?

A. Yes, sir.

Q. Do you have before you the original list, documentary proof that you have given to us to look over so that you may ascertain from that what sort of a shipment it was?

A. Yes, sir.

Q. I am interested, of course, in the Detroit Lakes, Minnesota shipment. Can you tell me what that was, as to the commodities?

A. It would appear to be eleven bundles of troughs, feed- [fol. 285] ing troughs.

Q. Feeding troughs?

A. Yes, scales, poultry coops and cartons.

Q. Empty cartons?

A. Not necessarily empty. It says 67 bundles of cartons.

Q. Sixty seven bundles of cartons, that would be knocked down cartons?

A. I would imagine.

Q. Now, then, does that show a rate there to Detroit Lakes, Minnesota?

A. Yes, sir.

Q. And that is the intrastate rate, is it?

A. That is correct.

Q. I notice that in your original record there is a freight bill of the Noble Transit Company which shows the shipment from Swift & Company, South St. Paul, to Detroit Lakes, Minnesota?

A. That is correct.

Q. Would you say that is an intrastate shipment?

A. That might depend.

Mr. Boyle: Mr. Examiner, I think that is a question of law whether it is or not. The witness might describe the movement.

Mr. VanOsdel: I think it is a proper objection. I will withdraw it.

By Mr. VanOsdel:

Q. What other physical facts can you give as informa- [fol. 286] tion about that record, Mr. Noble, that would help us?

A. Well, it would be my opinion that this particular merchandise probably had its origin east of the Twin Cities; that it had found its way to Swift & Company's receiving dock and there was rebilled for the purpose of payment of freight to the trucker who hauled it to its final destination. In other words, this particular movement was on the reverse end of the shipment.

Q. You took it in this instance from South St. Paul to Detroit Lakes?

A. That is correct.

Q. And somebody else must have taken it from Chicago to——

A. Here.

Q. Some other carrier?

A. Yes.

Q. It is not like those bills of lading that appear earlier in this case where it shows the Chicago bill of lading, is it?

A. No. This is South St. Paul. In fact, it is shipped up from Fairbanks Morse'- factory which ships all the general commodities billed, which is an item in interstate commerce from its original destination or original point of origin, Fairbanks Morse Company.

Q. So far as you are concerned, you don't know how it comes to South St. Paul, or when it comes to South St. Paul?

A. No, sir, I am not concerned.

[fol. 287] Q. You are not concerned. By the way, do you have intrastate authority in Minnesota to haul intrastate?

A. Yes, sir.

Q. At all times pertinent to the date before July 1st and after July 1, 1935?

A. Yes, sir.

Q. You have now, I take it?

A. Yes, sir.

Examiner Peterson: In this connection I would like to ask him what "restricted by license" means in connection with that certificate that he has?

Mr. Boyle: I was going to bring that out on re-direct. It is a perfectly good question.

The Witness: It is merely speculation to me. It is my idea that you are restricted as to the type of license you have as to an X license. The mere fact you may not have an irregular contract carrier operation throughout the State—if you have a license for merely a thirty five mile minimum it would not grant you authority to go beyond that. If, however, you had a Y license it gives you the privilege of travelling over any highway within the state. That would be your operation as to your authority from the Railroad and Warehouse Commission. If you had an interstate license which is an Z. I. C. that would permit you to operate only in interstate commerce.

By Examiner Peterson:

Q. What kind did you have?

[fol. 288] A. At the particular time in question we had a Y license.

By Mr. Boyle:

Q. What is that?

A. That is over any statewide routes.

By Examiner Peterson:

Q. Interstate or intrastate?

A. That gives you permission to travel anyway, anyhow on the highways of the state. I had some question with the License Bureau as to what constitutes an interstate shipment on this particular point. We have argued it. I find that this same type of movement is permissible to be operated on an interstate license which is a ZI license, which you pay on a mileage system. So, in connection with a movement of this kind the State of Minnesota would recognize that particular shipment transferred over their route would still be an interstate shipment.

Q. That is your opinion?

A. Yes.

Q. Your understanding of what they think?

A. I overcame the difficulty over there with them on that particular subject, having a ruling from the Attorney General's office on this subject.

Q. As you say, this shipment that we are talking about right now you hauled from South St. Paul to Detroit Lakes, Minnesota, it was a shipment which you did not haul from Chicago to South St. Paul, wasn't it?

A. It is a shipment where our records don't show.

Q. That is what I mean?

[fol. 289] A. Yes.

Q. I am referring to the records that you furnished us. You can appropriate we cannot go beyond that.

A. Yes.

Q. And the rate you charged was an intrastate rate from South St. Paul to Detroit Lakes, Minnesota?

A. That is correct.

Q. You had the right to charge that intrastate rate from the Minnesota Railroad Commission?

A. Yes, sir.

Q. You charged it?

A. Yes, sir.

Q. You collected it?

A. Yes, sir.

Q. Regarding the freight bill you have before you now: it reads, "Swift & Company, South St. Paul to Detroit Lakes, Minnesota"?

A. Breckenridge and Montevideo, yes.

Q. Just to clear the record, the same situation holds true with regard to Breckenridge and Montevideo as it does to Detroit Lakes, Minnesota; namely, it was a shipment which the record discloses you did not haul from Chicago, but had a point of origin from South St. Paul destined to those other Minnesota points?

Mr. Boyle: If we could frame it a little differently—the record does not disclose that he did haul, you understand?

The Witness: The records, however, disclose each separate item having its origin there in St. Paul.

[fol. 290] By Mr. Van Osdel:

Q. But you testified a little while ago that you didn't know if it came from Chicago, and you didn't haul it, isn't that a fact?

A. That is correct.

Q. And the rate charges you have set forth in this document that we are examining also show an intrastate rate on the Breckenridge and Montevideo shipments as well as Detroit Lakes, Minnesota?

A. That is correct.

Q. And I believe you said on the Detroit Lakes shipment it was scales and poultry, knocked-down bundle of cartons, that is correct, isn't it?

A. Yes, sir.

Mr. Edell: Just one question.

By Mr. Edell:

Q. You say, Mr. Noble, that scale, or the shipment of Fairbanks Morse, the shipment originated in Chicago?

A. No, I didn't state that. I said east of the Twin Cities.

Q. Do you know that to be a fact?

A. I do not.

Q. Fairbanks have a branch office in St. Paul?

A. I think they have only a sales agency in St. Paul. They carry no stock.

Q. Are you sure of that.

A. It was my opinion. I am not sure of it, no.

[fol. 291] Q. They have a branch office in Minneapolis?

A. I would not know that.

Q. When you said these are reshipped items, you meant that in every instance they originated outside of the Twin Cities?

A. I am merely taking the bill as it reads for reshipping account. In other words, an account where they have a freight account where there is more than one plant involved in the freight charges and in which the billing was most likely charged to the reshipping account which would indicate that it had its origin some place where there was a freight charge connected with it.

Q. Could that freight charge be a local carfage charge?

A. I would not think so.

Q. Then, you are satisfied and can state definitely that anything that is marked reshipped originates outside of the Twin Cities?

A. I would.

Mr. Boyle: There will be a witness this afternoon from Swift & Company who will be able to testify first hand on that, and a number of other witnesses.

Mr. Van Osdel: I was merely trying to get at the interstate character of that shipment.

Mr. Boyle: That will be developed later by a Swift & Company witness having direct knowledge of the fact and no supposition about it.

[fol. 292] Mr. Van Osdel: I forgot on page 1 of exhibit number 6, the fourth shipment down, June 3rd—no, July 3rd, 1935, Swift & Company, South St. Paul, Minnesota, to Detroit Lakes, Minnesota, Sauk Center, Minnesota, Grand Forks, North Dakota, I should designate that as shipment number 23.

Mr. Boyle: What is that?

Mr. Van Osdel: July 3rd, 1935.

By Mr. Van Osdel:

Q. You have that, Mr. Noble?

A. Yes, sir.

Q. Now, then, what is the Detroit Lakes shipment there? What does that consist of, that is, the commodities?

A. Four cases of cartons.

Q. Four cases of cartons?

A. Yes.

Q. What does the Grand Forks shipment consist of?
A. 121—124 bundles of box lumber.
Q. Is that it?
A. Yes, sir.
Q. As long as we are on it, let us touch Sauk Center.
A. I believe that is an intrastate shipment.
Q. You say that Sauk Center is an intrastate shipment?
A. Yes.
Q. Now, then, Mr. Noble, take the Detroit Lakes, Minnesota shipment. How many pounds was that?
A. 160 pounds.
[fol. 293] Q. What rate did it take?
A. Well, apparently it took a 68 cent rate.
Q. That is the intrastate rate?
A. It is. However, I would like to call your attention to the bills where it is shipped by Noble truck, shipped from Chicago and reshipped to account of Swift & Company Produce house, Detroit Lakes, Minnesota.
Q. Do you have the record there to show?
A. I have brought it in.
Q. From Chicago?
A. I am merely quoting from the billing.
Q. You are merely quoting from the billing of the Detroit Lakes shipment?
A. Of the Detroit Lakes shipment.
Q. You do not have before you any shipment or records showing the Chicago carriage, do you?
A. I have not examined that. I might do that to see if it would tie up. I don't believe I would be prepared to show the original movement from Chicago to South St. Paul. It only shows the bill illustrating from point of origin, South St. Paul, shipped from Chicago via Noble truck, out of South St. Paul to Detroit Lakes.
Q. You don't, of course, know whether it came from Chicago, or could you tell?
A. I would not be able to tell.
Q. Because the original record that you are looking at [fol. 294] now is what we might term a Twin City record?
A. Twin City record.
Q. Just from Swift & Company at South St. Paul?
A. Yes, sir.
Q. The Grand Forks shipment, 124 bundles of box lumber. What rate was charged for that?

A. Sauk Center?
Q. No, the Grand Forks shipment.
A. The Grand Forks shipment is 8365 pounds.

By Examiner Peterson:

Q. That is not lumber?
A. That is plant sales.

By Mr. Van Osdel:

Q. Oh, you have already testified that was 124 bundles of box lumber?
A. That was Sauk Center. Then you corrected yourself and said, "I am not interested in Sauk Center."
Q. What was the commodity for Grand Forks?
A. Plant sales.
Q. Do you have any way of telling what that is?
A. Some testimony has been given relative to the plant sales that would apply for this particular shipment.
Q. I notice that Mr. Bill Whalen again signed for the Detroit Lakes, did he?
A. That is my understanding of it. I explained when this matter came up before that this is what is called the Master Bill. In other words, accompanying this bill may be fifty bills showing this particular item here for this 8365 pounds. [fol. 295] For the purpose of convenience all that was on this truck which is designated as route 90, is just handled up to Grand Forks and takes in Detroit Lakes and is all that is listed on this master bill. When you go out the regular route, which would be taking Sauk Center, it being off the regular route, would carry its own bill.
Q. Answer me, if the rate to Grand Forks is the regular intrastate rate?
A. No, sir. That is the interstate rate.
Q. I call your attention to the next shipment to be found on 48?
A. 48?
Q. That is right. It is on page 8, and it is item one from the top? It will be called item 24.

Examiner Peterson: That is referring to exhibit 6.

Mr. Van Osdel: Right. It is dated July 5th, 1935, Chicago to St. Paul, South St. Paul and Detroit Lakes, Minnesota.

By Mr. Van Osdel:

Q. Will you look on that shipment?

A. Which one are you interested in? To Detroit Lakes?

Q. Yes.

A. We believe the testimony we gave yesterday relative to these shipments where Swift & Company's receiving department is signing for the shipment would stand for any of the items of this nature.

Q. So that you would say we could change to the Twin Cities instead of Detroit Lakes?

[fol. 296] A. Yes, sir.

Q. Proceed on to page 9 and you will find a New Rockford, North Dakota shipment and it is dated July 19, 1935.

A. The same answer for that. That one is even not recorded.

Q. I designate that as item 25, and it reads July 19, 1935, Swift & Company, Chicago, Illinois, to New Rockford, North Dakota. Shall we change that to Twin Cities?

A. Yes, sir.

Q. That has been changed to Twin Cities. Now, at the bottom of the page you will also find a shipment, that is page 9, dated July 24, 1935. I shall designate it as item 26, as Swift & Company, Chicago, Illinois, to Detroit Lakes, Minnesota; and I believe it shows a receipt at the Twin Cities. So may we change that to the Twin Cities?

A. Yes, sir.

Examiner Peterson: What item number is that?

Mr. Van Osdel: You mean what number I gave it?

Examiner Peterson: Yes.

Mr. Van Osdel: 26. That is July 24, 1935, the last one on page 9.

By Mr. Van Osdel:

Q. Now, then the next page, page 10, the first item at the top of the page which we will designate as item 27. That is July 26, 1935, shipment shown to be from Chicago, Illinois to Fargo, North Dakota of soap. I say to you that is the same situation, is it not?

[fol. 297] A. The same situation.

Q. We will change that to the Twin Cities?

A. Yes, sir.

Q. The next shipment is, the third from the bottom of the same page, we will call that item 28, which is July 29th, 1935, Swift & Company, Chicago, Illinois, and among other towns, the town of New Rockford, North Dakota. May we change that to Twin Cities?

A. Yes, sir.

Examiner Peterson: What page is that, number 10?

Mr. Van Osdel: 10, third from the bottom, July 29, 1935.

Examiner Peterson: Oh, yes.

Mr. Van Osdel: New Rockford.

By Mr. Van Osdel:

Q. Now, then, on page 11, the month of September 9, 1935, there is another shipment to New Rockford, North Dakota, from Chicago, Illinois. It is fourth from the top of page 11, and I shall designate it as 29. That is also a Twin City shipment, is it not, Mr. Noble?

A. I believe so, yes.

Examiner Peterson: How many more do you have? We were going to lunch?

Mr. Van Osdel: I will be through in just a little while.

By Mr. Van Osdel:

Q. Now, then, I show you the next page, page 12. There is an item number 6 from the top, and it is Swift & Company; Chicago, Illinois, to Detroit Lakes, it is glue. Designate that as shipment number 30. I ask you if that is not [fol. 298] a fact that is also a Minneapolis shipment?

A. Yes.

Q. Twin Cities?

A. Yes.

Q. I beg your pardon. I call your attention to page 13, the second shipment from the bottom, dated August 23rd, 1935. We will call it shipment number 31, that is Swift & Company, Chicago, Illinois, to among other towns Detroit Lakes, Minnesota. That will be Twin Cities, will it not?

A. Yes, sir.

Q. Will we change it?

A. Yes, sir.

Q. I call your attention to page 15, the fifth item down from the top which will be designated as item number 32,

and it is from Chicago, Illinois to, among other towns, Thief River Falls, Minnesota, of soap powder.

Mr. Boyle: Shipment of August 6, 1935?

The Witness: This also had its destination in the Twin Cities.

Q. So we can change Thief River Falls to the Twin Cities, can we not?

A. Yes.

Mr. Boyle: It is understood each time you are referring to changing the destination to Twin Cities that what is actually meant is that he is unable to show by his documentary evidence any movement by the Noble line——

[fol. 299] Mr. Van Osdel: Beyond.

Mr. Boyle: —beyond the Twin Cities.

Mr. Van Osdel: Yes.

Mr. Boyle: That is the destination.

Mr. Van Osdel: On the same page, page 15, sixth item from the bottom, and it is Swift & Company, Chicago, Illinois, for Detroit Lakes, Minnesota. It is dated August 8th, 1935, and it is Detroit Lakes, Minnesota, and Sauk Center, Montevideo, Minnesota and Milwaukee, Wisconsin, South St. Paul.

By Mr. Van Osdel:

Q. Now, so far as Detroit Lakes, Minnesota is concerned, this can be changed to Twin Cities, can it not?

A. Yes, sir.

By Examiner Peterson:

Q. How about Sauk Center?

A. That would apply to Sauk Center as well.

Mr. Boyle: Sauk Center was included in the statement we made this morning.

Mr. Van Osdel: I am only covering the towns of Detroit Lakes, and Grand Forks, not because they are the ones that I am interested in, but they are the only ones left.

By Mr. Van Osdel:

Q. I call your attention to page 16, the first one at the top of the page, Chicago, Illinois, to Grand Forks, North

Dakota, signed Swift & Company, B. C. It is dated September 6, 1935. I will call it item 34. I will ask you if that cannot be changed to the Twin Cities?

A. Yes.

Q. We change it to the Twin Cities. Now, then, I find a [fol. 300] Lake Park shipment, third from the bottom of page 16, from Chicago, Illinois, to Lake Park. I will signify that as number 35 and ask you if that cannot be changed to Twin Cities, Minnesota?

A. It can.

Q. Change it to Twin Cities, Minnesota. On the next page, page 17, down halfway in the middle there is a shipment to Fargo, North Dakota from Chicago, and that is dated October 1, 1935, canned meats, signed Swift & Company, B, C. That also can be changed to the Twin Cities, can it not?

A. It can.

Q. That will be designated as item number 36?

A. Yes.

Q. On the next page, page 18, I find at the top of the page, dated 10-4-35, from Chicago, two shipments to Grand Forks, North Dakota, Fargo North Dakota, of peanut butter, I shall designate the two of them item 37. I ask you if that cannot in its entirety be changed to Twin Cities?

(No response).

Q. Now, I refer you to page 19, which is the last page. On the last item there is a shipment dated October 31, 1935, from Chicago to Fargo, and is 36 pounds at the rate of thirty-five cents. I shall call it item 38. I ask you if we can change that to Twin Cities?

A. Yes, sir.

Q. The last item on page 16, September 26, 1935, from [fol. 301] Chicago, Illinois, Swift & Company, to Detroit Lakes, Minnesota, found on page 16, I shall call that 29, and ask you if we can also change that to the Twin Cities?

A. Yes, sir.

Mr. Van Osdel: Do you desire, Mr. Examiner, now, to have lunch?

Exam. Peterson: We will adjourn for lunch, until 1:15 p. m.

(At 12:10 o'clock p. m., adjourned until 1:15 p. m.

Afternoon Session, 1:15 P. M.

Exam. Peterson: Any further cross examination?

Mr. Fiddes: I guess it is my turn to ask questions.

JOHN F. NOBLE, recalled for further cross examination:

By Mr. Fiddes:

Q. Mr. Noble, up to this point in the examination we have been concerning ourselves largely with territory that you were claiming under which you are offering to prove that you operated under. I would like to get into now rather the questions of the nature of your operations from July 1, on and about the date, 1935. I start by going over a little bit of your testimony that you gave at the beginning of the trial yesterday and tie the things together. I believe you testified that you started the trucking business November 1, 1934.

A. As a contract carrier, yes, sir.

Q. As a contract carrier?

A. Yes.

[fol. 302] Q. At that time you began to haul for Swift & Company?

A. That is correct.

Q. Did you do that work for Swift & Company under contract?

A. I did.

Q. Was it a written contract?

A. It was, supplemented by oral.

Q. And the written contract under which you did that was the contract concerning which your counsel spoke yesterday morning?

A. It was.

Q. May I inquire whether that contract is now available for the record?

A. It is supposed to be here about 1:30.

Q. Now, at the time you entered this contract with Swift & Company, you were operating two vehicles?

A. Yes, sir.

Q. This contract required you to perform trucking operations for Swift & Company, generally, in parts of Wisconsin, Illinois, North Dakota and Minnesota?

A. The contract specifies in what districts.

Q. The operation that you performed under that contract was in parts of those states?

A. The operation I performed was actually serving certain points and places in these various places and holding myself at all times ready to go to any of the other places within the territory for the shipper involved.

Q. I think you testified that the two trucks that you were [fol. 303] operating then were put at the exclusive disposal of Swift & Company?

A. They were.

Q. Now, in February, 1935, you testified that you started hauling for Libby, McNeil & Libby?

A. Yes, sir, under Swift & Company, in Chicago, as the dispatcher of the product.

Q. Libby, McNeil & Libby are located in Chicago?

A. Yes, sir.

Q. Or were at that time?

A. They are yet.

Q. Were they a subsidiary of Swift & Company?

A. They are so considered, yes.

Mr. Boyle: I think the witness is not qualified to answer that, because if you will permit me, personally that is not a fact.

Mr. Fiddes: Let me put it this way:

By Mr. Fiddes:

Q. Did you operate under a contract in the operations you performed for Libby, McNeil & Libby?

A. I did.

Q. Was that a different contract than the one you had with Swift & Company?

A. It was.

Q. Do you have a copy of that contract?

A. I have.

Q. Is it present, available?

Mr. Boyle: We have not a copy. We have the original, [fol. 304] that you may inspect if you wish.

Mr. Fiddes: Are you going to put that contract in evidence?

Mr. Boyle: No. I do not mind your seeing it if you wish.

Mr. Fiddes: I really think it is material to this case that such contract as this carrier operated under prior to July 1st ought to be made a part of the record.

Examiner Peterson: Unless they could prove they were actually operating under contract—I think it is up to the

applicant to show that he was actually operating under the contract. It seems to me the best evidence would be the contract itself. If you have any other way of doing it, all right.

Mr. Boyle: If the examiner wishes us to have this contract copied and introduced into the record we shall gladly do it.

Examiner Peterson: I think it would be well.

Mr. Boyle: Very well, we shall do it.

Mr. Fiddes: Right there arises a little difficulty. What about being assigned an exhibit number?

Examiner Peterson: Well, yes, because he is not going to submit the original and the copy is not in the docket, is it?

Mr. Boyle: I ask leave to furnish a copy of the contract within the next week. I think we can give it to you tomorrow.

Mr. Fiddes: Off the record.

(Discussion outside the record.)

[fol. 305] Mr. Boyle: It will be understood, Mr. Examiner, at the end of the hearing, as we frequently do, when a copy is furnished it will be given the exhibit number, whatever the sequence is.

(Discussion outside the record.)

Mr. Boyle: At the request of the Examiner the applicant here is exhibiting to the Examiner and to any interested party the contract between Noble Transit Lines and Libby, McNeil & Libby, dated February 6, 1935, and we will, if given permission, furnish accurate copies of this contract to the Commission and to all parties interested.

Examiner Peterson: Within five days?

Mr. Boyle: Yes, within five days and at which time it can be given an exhibit number and the Commission may designate it. Is that agreeable?

Examiner Peterson: Yes.

Mr. Fiddes: Off the record.

(Discussion outside the record.)

Mr. Fiddes: Let me ask:

By Mr. Fiddes:

Q. Mr. Noble, I will hand you here what seems to be an agreement entered into between you and Libby, McNeil

& Libby Company on the 6th day of February, 1935, and ask you whether that is the written contract under which you performed operations for the Libby, McNeil & Libby Company, commencing on the date the contract bears?

A. It is, where shipments are to Libby, McNeil & Libby at [fol. 306] destination.

Q. What do you mean by that, Mr. Noble?

A. Where shipments are to Swift & Company, destination, and Swift & Company are responsible for the freight, therefore, it moved under Swift & Company's contract which had the insurance provision making the shipment covered by Swift & Company's insurance.

Q. Now, were you billing such shipments Swift & Company, or Libby?

A. Where the destination would be Swift & Company they were billed for Swift & Company, and where the destination was Libby, McNeil & Libby, as customer, we billed it Libby, McNeil & Libby.

Q. On such hauls as you made for Libby, McNeil & Libby, is the document I have just handed you, the contract under which those hauls were made?

A. It is.

Q. That also is the document which you are going to furnish copies of for this record within five days?

A. It is.

Q. How long has this contract continued in effect?

A. It is still in effect.

Q. The same contract?

A. It has probably been altered according to the regulations required by the Interstate Commerce Commission, requiring filing of bilateral contracts, but this was in effect up to that time.

Q. Examiner Peterson: What is the date of it, please? [fol. 307] Mr. Fiddes: February 6, 1935.

By Mr. Fiddes:

Q. You testified yesterday with respect to your operations for Libby, McNeil & Libby Company, that they were performed in conjunction with your Swift operations?

A. That is correct.

Q. Will you explain what you mean by that?

A. We have no representative in Chicago. We had no representative at that time in Chicago. In any operations involving Libby, McNeil & Libby, the dispatching was done through Swift & Company in Chicago.

Q. So that as far as the operations performed by you as a carrier were concerned they were performed substantially the same as Swift operations?

A. That is correct.

Q. Such directions as you received as to the times and routes of shipments to be carried were received through Swift & Company?

A. That is correct.

Q. You testified also, Mr. Noble, as I recall, that on or about June 1st, 1935, you entered into a contract with the Kraft Phenix Corporation?

A. That is correct.

Q. Do you have the original of that contract present in the room?

A. We have not.

Q. Do you have it at present in your files?

[fol. 308] A. We have been unable to locate it. We could obtain the original by getting a duplicate out of Kraft's files, undoubtedly, out of Chicago.

Examiner Peterson: What date was that entered into?

Mr. Fiddes: June 1st, 1935.

By Mr. Fiddes:

Q. I understood you to testify yesterday, however, Mr. Noble, that you did not commence any hauling under that contract until March of 1936?

A. That is correct.

By Mr. Boyle:

Q. March or February?

A. I think it was March.

By Mr. Fiddes:

Q. The record will show. I think you started under the other two contracts about the dates they bear?

A. I believe that the documentary proof would fairly substantiate that.

Q. Then, as I understand your oral testimony of yesterday as you have repeated it now, prior to March of 1936 you hauled only for Swift & Company and Libby, McNeil & Libby, is that correct?

A. No. Our contract carrier authority is——

Q. Did you perform any other operations for anybody else?

A. Oh, occasionally, out of the Chicago area. Where freight was light for Swift & Company and Libby, McNeil & Libby, we moved truckloads of common carrier freight for other common carriers operating between Chicago and the Twin Cities.

Q. You have not performed such operations within recent [fol. 309] months, Mr. Noble?

A. No, sir.

Q. In fact, it has been a considerable time, has it not?

A. Quite a period, yes, sir.

By Mr. Boyle:

Q. In that particular operation you were a sort of an agent for the common carrier trucker that you carried it for.

A. I would not know.

Mr. Boyle: That is a legal question. Strike it.

By Mr. Fiddes:

Q. As a matter of fact you hauled full loads consisting in the aggregate of individual shipments where you received a flat rate from the common carrier for whom you were hauling?

A. We moved it from dock to dock for the same carrier.

Q. As a full load?

A. As a full load.

Q. It might have been composed of a number of individual shipments or not?

A. That is true.

Q. In any event, your compensation was received from the common carrier for whom you hauled?

A. Yes, sir.

Q. It was based upon such an agreement as you had with the carrier, for charges?

A. Yes, sir.

Q. It was a flat rate by truck load lots over that distance? [fol. 310] A. It was a rate of so much per hundred for the bulk or weight in the truck.

Q. I notice in your exhibits 5 and 6 that under the head of shipper or consignee appear names other than Swift & Company or Libby, McNeil & Libby?

A. Those are a list of, I believe, correctly stated, subsidiaries, such as the Omaha Packing.

Q. We will take one at a time and identify it.

A. All right.

Q. One of the names that appears here as being the shipper or consignee is Derby Foods, Incorporated.

Examiner Peterson: What exhibit?

Mr. Fiddes: That would be exhibit 5.

Examiner Peterson: What page?

By Mr. Fiddes:

Q. It appears in several pages. I notice that on page 8, the first one that comes to my attention.

A. I believe Derby Foods is rightfully classified as a subsidiary of Swift & Company.

Q. It is your testimony in this case that in accordance with the best of your belief it is a subsidiary?

A. It is.

Q. Did you perform your operations for the Derby Foods, Incorporated, under your Swift & Company contract?

A. I did.

Q. You performed all of them under that contract?

A. Yes, sir.

[fol. 311] Q. That you performed?

A. Yes, sir.

Examiner Peterson: May I interrupt here a moment? Does the Swift contract cover subsidiaries, also?

Mr. Boyle: Also subsidiaries.

Mr. Fiddes: I think by its terms——

Mr. Boyle: Yes, it does, very specifically.

By Mr. Fiddes:

Q. I take it it is not necessary to go through the various places where Derby appears. Wherever you hauled for Derby it was hauled for Swift & Company as you have testified to?

A. Yes.

Q. I also notice the name G. H. Hammond Company?

A. That is also, to my understanding, a Swift subsidiary.

Q. Were your operations for that company performed under the contract you had with Swift & Company?

A. They were.

Q. Your operations for these two companies would generally be a part of your so-called Swift & Company operation?

A. That is correct.

Q. Another name that appears in exhibit 5 is that of the Omaha Packing Company. Is that connected with Swift & Company?

A. That is correct.

Q. That would also come under the heading of subsidiaries?

A. It would, to the best of my knowledge.

Q. Were the operations you conducted for the Omaha [fol. 312] Packing Company conducted under the contract you had with Swift & Company?

A. They were.

Q. I call your attention to the name Container Corporation which appears also on exhibit 5. Does that have any connection with Swift & Company?

A. I don't believe so.

Q. Under what arrangement did you work for the Container Corporation?

A. Under the instructions from Swift & Company, where Swift & Company paid the freight.

Q. In other words, was the Container Corporation a source from which Swift & Company obtained the supplies that you hauled for Swift & Company?

A. That is correct.

Q. Under your contract for Swift & Company you would pick up the supplies from the Container Corporation and haul them to such destination as you were instructed to haul them to by Swift & Company?

A. That is correct.

Q. You performed that hauling under your written contract with Swift & Company?

A. Yes, sir.

Q. Would that situation also be true of the Rockford Fiber Corporation?

A. It would.

[fol. 313] Q. Would it be true also of the Imperial Paper & Color Corporation?

A. That is a shipment.

Q. That is one that apparently moved on February 7, 1935 and would be reflected,—it is the last item on page 9 of exhibit 5?

A. That is the shipment. I happened to be in the real estate business and I have some friends in the Wall paper business. That was a verbal contract with the Pure Paint Company, and the B. W. Baker Company moved that shipment to Chicago.

Q. You did operate—I mean, that was hauled under an oral contract?

A. Under an oral agreement, yes, sir.

Examiner Peterson: Just a moment now.

By Examiner Peterson:

Q. Under an oral agreement, was that filed with the Interstate Commerce Commission?

A. No, this was back——

Mr. Fiddes: February, 1935, before the Act was thought of.

Examiner Peterson: Yes.

By Mr. Edell:

Q. You are making no claim under it?

A. We are making claim for general commodities here.

By Mr. Fiddes:

Q. Again you say you were in the real estate business, and you identify one or two of these people that wanted this wallpaper, is that it?

A. That is correct.

[fol. 314] Q. You got it for them from the Imperial Paper & Color Corporation?

A. Yes.

Q. And brought it up?

A. Yes.

By Examiner Peterson:

Q. Have you hauled for them since?

A. I don't think for two years. It is possible, but that would be my belief, roughly speaking.

By Mr. Fiddes:

Q. I think the only shipment prior to October 15 was the single instance of this wallpaper being brought up under

the circumstances that Mr. Noble testified. You notice also the name of Central Cheese Company listed in exhibit 5?

A. Yes, sir.

Q. Under what circumstances did you haul for them, if you did haul for them?

A. Under the Swift contract.

Examiner Peterson: What page, please?

Mr. Fiddes: On April 18, 1935 there was such a shipment.

Mr. Boyle: Marshfield, Wisconsin to South St. Paul.

Mr. Fiddes: You say you performed——

Examiner Peterson: What page?

Mr. Boyle: 15, bottom of the page.

By Mr. Fiddes:

Q. That cheese was cheese that was consigned to Swift & Company, was it?

A. That is correct.

[fol. 315] Q. And in hauling that cheese you acted as the carrier for Swift & Company?

A. Yes, sir.

Q. Not for the Central Cheese Company?

A. That is correct.

Q. You hauled it under your Swift & Company contract?

A. Yes, sir.

Q. I call your attention to the Plankington Packing Company, whose name appears on exhibit 5. Does that have any connection as a subsidiary?

Examiner Peterson: Mr. Fiddes, just for the convenience of the Examiner and the Commissioner we do not want to hunt through the whole exhibit to find Plankington & Company.

Mr. Fiddes: You understand, Mr. Examiner, that I am not particularly calling your attention to specific shipments, but just the fact he hauled.

Examiner Peterson: We would like to know where it is.

Mr. Boyle: On page 13, the second from the bottom.

Mr. Fiddes: Read the last question.

(Last question read.)

By Mr. Fiddes:

Q. With Swift & Company?

A. I would not be prepared to answer that as to whether they operate as a subsidiary. That is a subsidiary according to Mr. Logman of Swift & Company.

By Examiner Peterson:

Q. You think so?

A. He states——

[fol. 316] Q. Who?

A. Mr. Logman of Swift & Company. He just nodded his head. That is the best of my knowledge.

By Mr. Fiddes:

Q. You recently have been informed from an authoritative source that Plankinton is a subsidiary of Swift?

A. Yes, sir.

Q. I take it then that such hauls as you made for the Plankinton Packing Company are reflected in exhibit 5 and were billed under your Swift & Company contract?

A. We also developed in that period of time. I would not testify right now as to whether the contract was dated prior to July 1st or immediately afterwards.

Q. Let me say this; these shipments I have reference to moved on April 1st, 1935, and on May 18, 1935.

A. It is possible they were hauled either under Plankinton, Plankinton Company's contract, or Swift & Company. They came into being at the same time, the contract with Plankinton Packing Company.

Q. Do you know now when that contract was entered into?

A. I couldn't say at the present time. I can find out what date.

Q. Do you have a copy of the contract available in the room at the present time?

A. No, sir.

Q. If that shipment was moved before you entered the contract with the Plankinton Packing Company, it was moved under the contract of Swift & Company?

[fol. 317] A. That is correct.

Q. If it was moved under a contract with the Plankinton Packing Company, that is a subsidiary of Swift & Company, as I understand it?

A. That would depend as to who paid the freight, as to under which contract that was offered.

Q. As a matter of fact, your contract with Swift & Company covered operations with subsidiaries also, didn't it?

A. Yes, sir; that is correct.

Q. I call your attention to the name of Solar-Sturges Manufacturing Company, for whom your exhibit 5 reflects your hauling a shipment on June 28th, 1935, the third from the bottom on page 21 of exhibit 5.

Mr. Boyle: Chicago to Mason City.

The Witness: That was also carried under the Swift & Company contract.

By Mr. Fiddes:

Q. That again was a case of where you were delivering supplies to Swift & Company?

A. That is correct.

Q. You delivered those under your contract with Swift & Company?

A. Yes, sir, that is correct.

Q. These names I have mentioned appear in your exhibit 5 which has to do with your operations performed between November 17, 1934 and July 1, 1935. I want the inquiry answered to certain names other than these which appear [fol. 318] in your exhibit 6 as having to do with your operations July 1st and October 15, 1935. On July 12, 1935 your exhibit reflects that you carried a shipment for the W. O. Goodrich Company, from Milwaukee to Minneapolis, consisting of codliver oil. Will you state for the record who the W. O. Goodrich Company is?

Examiner Peterson: What page?

Mr. Fiddes: 8.

The Witness: That shipment was moved in conjunction with the Moore Transfer Company of St. Paul.

By Mr. Fiddes:

Q. Will you explain a little more fully what you mean by that?

A. Their status is undetermined, I think. We moved that assuming that the Moore Transfer to be brokers an they gave us instructions for the pickup.

Q. In understand the shipment then was not handled to Swift & Company?

A. That is correct.

Q. Or for Swift & Company?

A. That is correct.

Q. Was it hauled under any contract?

A. No, sir.

By Examiner Peterson:

Q. Well, in this connection what makes you think that you could haul a shipment for a broker that you yourself didn't have any right to haul?

A. This was long before the law was passed.

[fol. 319] Mr. Boyle: July, 1935.

Examiner Peterson: Very well.

By Mr. Fiddes:

Q. That, incidentally, seems to me the only shipment you hauled for W. O. Goodrich prior to October 15, 1935?

A. Yes, sir.

Q. Now, directing your attention to the Manitowoc Refrigerating Company——

Examiner Peterson: What page?

Mr. Boyle: 10.

By Mr. Fiddes:

Q. For whom you hauled a shipment, as your exhibit reflects, on July 31st, 1935, and another on August 9, 1935. Were those shipments again hauled for Swift & Company?

A. That is correct.

Q. Again it is a case where you delivered supplies to Swift & Company?

A. Cheese.

Q. That was hauled under your contract?

A. Swift Company contract.

Q. For Swift & Company?

A. Yes, sir.

Examiner Peterson: What is the name of the company again?

Mr. Fiddes: Manitowoc Refrigerating Company.

By Mr. Fiddes:

Q. On page 11 of exhibit 6, I notice the name Martin Pnt. Corporation, that I take to be Martin Peanut Products Cor-

[fol. 320] poration?

A. Yes, sir.

Q. It appears from your exhibit that on that day you hauled a shipment for that corporation between Chicago and South St. Paul consisting of peanut butter?

A. Yes. That was hauled under the Swift contract.

Q. That shipment was hauled under the Swift contract?

A. Yes, sir.

Q. Swift & Company being the consignee of that shipment, was it?

A. That is correct.

Q. On the same page, a little farther down, under date of September 16, 1935, is the shipment apparently hauled for the Aaron David Paper Company, consisting of chipboard. Was that shipment hauled for Swift & Company?

A. That is correct.

Q. Again, under your contract with Swift & Company?

A. That is correct.

Q. In the course of delivering supplies to them?

A. Yes, sir.

Q. On page 12, your exhibit 6, it reflects that on August 30, 1935, you hauled a shipment of cheese from Pauly & Pauly, Marshfield, Wisconsin, to South St. Paul. Was that also hauled under your Swift contract?

A. Yes, sir.

Q. For Swift & Company as consignee?

[fol. 321] A. Yes, sir.

Q. On Page 15 of the same exhibit there is reflected a reshipment moving on August 5th, 1935 between Minneapolis and Chicago consisting of beef trimmings of which the shipper—or consignee is named Booth Cold Storage. How did that shipment move?

A. That was under Swift & Company contract.

Q. Under the Swift & Company contract?

A. Yes.

Q. Then with *two exceptions all of the operations reflected in your exhibit as having been performed prior to October 15, 1935, were hauled under your contract with Swift & Company, and your contract with Libby, McNeil & Libby?*

A. That is correct.

Q. I gather from your testimony that it is a fact, Mr. Noble, in general, the *nature of your operations for Swift & Company was that you would haul products manufactured, sold by Swift & Company for them to customers, to destinations from which they were to be sold, or you would be hauling supplies for Swift & Company to Swift & Company.* Is that the general nature of your hauls?

A. That is correct.

Mr. Boyle: What is that last?

Mr. Fiddes: That he would be hauling supplies to Swift & Company at one of its designated places and for Swift & Company.

The Witness: In interstate commerce or intrastate com-
[fol. 322] merce.

Mr. Fiddes: You said that was the nature?

A. That is correct.

Q. Well, now, I take it that in the hauling of commodities that were manufactured and sold by Swift & Company you hauled those to such points as they required to be hauled for the purpose of there being sold.

A. So used at various points in the setup. In other words, supplies as well as manufactured products for Swift & Company itself.

Q. What do you mean, supplies that they would sell as distinguished from supplies they would buy?

A. I didn't say sell; they would use themselves.

Q. I am talking about those things that you hauled for them that they manufactured and sold to the general public. The purpose of your service there was to get those articles delivered as Swift & Company wanted them delivered to the points where they were to be sold.

A. Yes.

Q. To be delivered by Swift & Company to the people who bought them?

A. Correct. *Our function was merely to serve Swift & Company.*

Q. That is true. Mind you, we are having in mind only at the present moment only those articles that Swift & Company manufactured and sold to the general public, not the articles which they needed for other purposes and bought from others.

[fol. 323] A. I would qualify that with any additional service, transporting articles to Swift & Company.

Q. I say you did that also?

A. Yes.

Q. I am going to come to that.

A. Yes, sir.

Q. But all I mean is so far as you transported products that were manufactured and sold by Swift & Company you delivered them for Swift & Company to the person who had bought them from Swift & Company, did you not, ordinarily?

A. That would be correct.

Q. For instance, this store-door delivery?

A. Yes.

Q. That was the purpose of your contract. If they made sales you would deliver them?

A. Yes.

Q. Before you had the store-door delivery you delivered to the break bulk point?

A. Yes, or branch house.

Q. Or branch house, possibly?

A. Yes.

Q. You claim your territory for such operations for Swift & Company, depending upon, perhaps changing location of Swift & Company's customers?

A. That is correct; on Swift & Company's demands. The demand for that kind of transportation was largely determined by where the customers were who got the goods that [fol. 324] they were delivered to.

Q. Yes.

A. By the volume of freight to be moved in the particular territory at the particular time.

Q. Well, now, Mr. Noble, these supplies that you hauled for Swift & Company, I take it were in all cases delivered to Swift & Company?

A. Yes, sir.

Q. Or one of it's branches?

A. That is correct.

Q. Where in the state of Minnesota on July 1st, 1935, did it have these various branches, to the best of your present recollection?

A. Detroit Lakes.

Mr. Van Osdel: What was the question, Mr. Reporter?

(Question read.)

The Witness: East Grand Forks, Breckenridge, Montevideo, Sauk Center, Marshall, Waseca, in the State of Minnesota, St. Paul, South St. Paul, and Minneapolis, Duluth, Winona.

By Mr. Fiddes:

Q. You are speaking of July 1st?

A. You asked where they had these branches.

Q. July 1, 1935?

A. Yes, Fargo, North Dakota, Mason City, Iowa, Sioux City, Iowa, Hampton, Iowa, Algona, Iowa, Green Bay, Wisconsin.

Q. As a matter of fact my question was only as to the State of Minnesota.

Mr. Boyle: That is what I thought.

[fol. 325] Mr. Fiddes: Other people may be interested in those towns.

By Mr. Fiddes:

Q. I did not realize you were going on so long.

A. Yes.

Q. Those would be the places at which Swift & Company, ordinarily would receive its supplies it bought?

A. Yes.

Q. Where you and your truck hauled the particular supplies, it would be to one of those places?

A. That is correct.

Q. Now, on the first page of your exhibit 5, Mr. Noble, is what purports to be a list of the commodities shipped or received by Swift & Company?

A. That is correct.

Q. Would you be able to identify which of those commodities there listed would be the commodities manufactured and sold by Swift & Company and which would be supplies purchased and received by Swift & Company?

Mr. Boyle: If I may interrupt we are going to follow with the witness from Swift & Company who would be better able to answer.

The Witness: If I do testify, I would not be capable.

Mr. Fiddes: Do I understand you are going to follow with a witness who would? Then, I won't ask him to do it to the best of his knowledge even. There are many of [fol. 326] them that are self evident.

Mr. Boyle: There will be a man from Swift who will be competent to answer that question.

Mr. Fiddes: You may inquire, Mr. Overmyer.

By Mr. Overmyer:

Q. Mr. Noble, for what product was this special equipment built?

A. For the handling of fresh meats and packing house products.

Q. Now, you have designated fresh meats.

A. And other refrigerated articles that might be handled by the shipper.

Q. Tell me again just how that equipment was special, in what particulars?

A. Well, one item was they have meat rails that is uncommon to the average truck.

Q. That is for fresh meats or meats of any kind, is that it?

A. Yes, sir.

Q. All right, now, in what other particular?

A. Well, they have heavier insulation than the average truck in general use.

Q. What particular product would you say that heavier insulation is for?

A. For perishable products.

Q. Well, do you have to have it for cheese?

A. It is well to have insulated trucks for cheese, in fact, it is necessary.

Q. This extra heavy insulation that you speak of?

[fol. 327] A. That is incidental to the general purpose of what the trucks were built for.

Q. As a matter of fact, extra insulation is merely for the fresh meats, isn't it?

A. It is for the refrigerated product.

Q. I say, is it primarily for the meats or not?

A. No, it is for the refrigerated products.

Q. Did you not haul any of those products before you had this heavy insulated truck?

A. No, sir.

Q. Weren't you handling any of them?

A. Oh, the original trucks had a certain amount, but we were criticised for it, that is why we were required to build them over. It so happened at the time of the year that we started hauling for Swift & Company was in the winter time when refrigeration was not essential.

Q. Well, let us get along to 1935. When was it you put on these extra heavy insulated trucks?

A. We started in March and continued right straight through the year, each new truck being built up to the Swift specification.

Q. Did you handle any mayonnaise for Swift & Company?

A. Yes.

Q. From where to where?

A. I would say from Chicago to St. Paul to Minneapolis.

Q. Did they manufacture the products themselves?

[fol. 328] A. Under Derby foods, yes, sir.

Q. Directing your attention now to the operations, as far as Chicago is concerned, and prior to July 1, 1935, firstly, where in Chicago would you receive shipments that were transported under the Swift & Company contract?

A. There at 110 House, Swift & Company, Chicago, or at the various affiliated companies of Swift & Company, or if the shipment was great enough, at the manufactured place where the article was purchased.

Q. And with respect to the Twin Cities, where would the particular shipments that you just mentioned where would they be delivered?

A. They might be delivered at South St. Paul, St. Paul market, Minneapolis market, Minnesota Transfer, or if the shipment was large enough, directly to the customer itself. Derby Food had a special, or had a special mail department and the articles sold by Swift & Company salesmen. At least, I think that is the condition.

Q. You mentioned South St. Paul, do you mean by that Swift & Company plant, or its branch there?

A. Swift & Company's. When I mentioned South St. Paul, I meant the packing house together with its transfer team-docks.

Q. That is in conjunction with the plant?

A. That is correct.

Q. You mean, do you, their premises in Minneapolis and in St. Paul when you refer to those points?

[fol. 329] A. Well, wherever the consignee, wherever the freight bill would permit the consignee to actually——

Q. What I am trying to ascertain is really what type of service you are performing. It is clear enough from Swift & Company's plant in Chicago to Swift & Company's plant in Minneapolis.

Mr. Boyle: I don't like to be objecting, but must we go over that all again? It looks like this is a repetition. That was gone over very carefully and thoroughly by the preceding counsel. Merely because there are other counsel, I don't think we should burden the record with the repetition unless there is something new and additional counsel

wishes to inquire. I make that suggestion in the interest of expedition.

Examiner Peterson: Haven't we covered that, Mr. Overmyer?

Mr. Overmyer: I didn't feel we had, Mr. Peterson. I didn't think the Twin Cities in the particular I mentioned them had been covered at all. There have been some general questions.

Examiner Peterson: It was certain shipments.

Mr. Boyle: Most comprehensively. It involved everything that Swift handled out of there, whether they manufactured it or bought it themselves, or whether it was supplied.

Examiner Peterson: I don't think they went into that very much. Go ahead.

Mr. Overmyer: May I proceed?

Examiner Peterson: Yes.

[fol. 330] By Mr. Overmyer:

Q. With respect to some other products transported from Chicago to Minneapolis, where else might those shipments be consigned besides the plants of Swift & Company?

Mr. Boyle: Just a moment. I object to that question because it is not clear. The witness may understand it, but, frankly, I do not. I do not know what he means. It is quite general.

Examiner Peterson: Referring to these particular products?

By Mr. Overmyer:

Q. Where in the Twin Cities or in South St. Paul, aside from Swift & Company's plants did you deliver shipments prior to July 1, 1935?

Mr. Boyle: Swift & Company's shipments?

Mr. Overmyer: Yes.

Mr. Boyle: Swift & Company's shipments, all right.

The Witness: Well, that would require going through the records to see who actually signed the delivery receipt on it. It may have been Swift & Company, South St. Paul, Swift & Company, St. Paul, Swift & Company, Minneapolis, or any one of the customers involved in the transactions of Derby Foods or Libby, McNeil & Libby, or any

of the other subsidiaries to which we haul under the Swift contract.

By Mr. Boyle:

Q. You mean that customer was located in the Twin Cities?

A. In the Twin Cities.

Q. By their location you refer to their place of business [fol. 331] at which delivery would be made under those conditions?

A. If the shipment was sufficiently large it would be delivered right to the wholesale house, such as C. A. Pearson Wholesale supplies, whoever the consignee happened to turn out to be, if the shipment was of any size.

Mr. Boyle: Well, what difference does it make if it was a shipment, a big shipment of Swift & Company customer moving from Chicago to the Twin Cities, whether it was delivered on a street, or yard, it was admitted it was a Swift & Company customer. All right. I submit the question has been most thoroughly covered by my friend across the table there in his examination.

Examiner Peterson: I don't think he covered this feature of it.

Mr. Boyle: Is it going to make any difference whether he delivered it on one street or another street?

Examiner Peterson: I understood at the beginning of this hearing that Swift & Company shipments were delivered to Swift & Company's place of business.

Mr. Boyle: To customers or branch houses.

Examiner Peterson: At their branch houses. Now, some shipments were delivered to some other place. I am not clear about it.

Mr. Boyle: Delivered to Swift customers wherever they might be located. This question is directed to Twin Cities. There are several customers of Derby Food, customers of [fol. 332] companies affiliated with Swift & Company who have customers in the Twin Cities. It means that some of the shipments would be delivered to them.

Mr. Overmyer: If you want to testify, that is all well and good. If you will let me proceed with the witness I will develop these features.

Examiner Peterson: It might be pertinent, something the Commission might want to know.

Mr. Boyle: If you make anything out of it, I can't.

By Mr. Overmyer:

Q. You have mentioned customers of Swift & Company. Does that mean wholesale customers or did you ever deliver to retail markets?

A. I personally have not followed the products to where they were delivered. I can only go by the records.

Q. Well, as far as your records are concerned, and those that you are now producing, do you show deliveries to wholesale distributors that Swift & Company were selling to in the Twin Cities?

A. I think we will be able to show that, yes, sir.

Q. You don't service the retail customers of Swift & Company, do you, in the Twin Cities?

A. Only if their capacity was great enough to buy a quantity sufficient to make a stop worth our while to deliver direct. Small shipments we never bother with. As the Libby contract indicates, the very most we will consider stopping in the city would be two or three stops.

[fol. 333] Q. I didn't quite understand that.

A. I say, the general nature of our business is that we move truckloads, or practically truckload shipments. A small shipment we would not deliver direct to the customer.

Q. That would be taken, in other words, from the plant of Swift & Company?

A. Yes.

Q. They in turn would make some other disposition of it?

A. That is correct.

Q. Then, in the Twin Cities, and South St. Paul, would you have occasion to pick up shipments in which Swift & Company was interested, supply shipments and the like for the packing house?

A. Will you repeat that?

Q. I say, in the Twin Cities and South St. Paul, did you pick up any shipments of supplies for the packing house?

A. That would be possible.

Q. Do you know whether or not you did?

A. I would not be able to testify.

By Examiner Peterson:

Q. Do the shipments listed in your exhibit cover any such shipments?

A. We understand that a shipment with an origin of Swift & Company, St. Paul, as far as the records show might have originated at South St. Paul, and St. Paul

markets or Minneapolis markets, as far as several are concerned. In other words, they might have had a bunch of [fol. 334] butcher knives in Minneapolis that were headed for Green Bay that our track might have picked up over there or being billed to Swift & Company on a St. Paul or South St. Paul billing. So I am not in a position to state the particular shipment originated in South St. Paul, Minneapolis, or St. Paul; but, in all probability those things being handled from the branch house or branch houses, your source of supply to these small branch houses, it is possible those items were shipped.

By Mr. Overmyer:

Q. Where you designated Swift & Company, South St. Paul, have you mentioned the branch house of Swift & Company there at South St. Paul or Minneapolis or St. Paul, or is that what is the intent in this exhibit?

A. That exhibit is merely the bill of lading headed Swift & Company, and where the bill states is the origin. We can't designate it any closer than taking the bill of lading and use it. There are occasions when we know that we have directly gone to this particular concern or that particular concern to get a shipment of sufficient size that went in interstate movement to some destination which we picked up outside of the plant, going down to the plant to fill out the truck for movement to destination. As far as our records would show we would only show Swift & Company, St. Paul, as the shipper, and the actual physical movement of getting that merchandise probably in some instances made by our truck actually was made under some instances by our truck and moved in interstate commerce.

Q. But you are not saying that the record would not indicate.

[fol. 335] A. It would not.

Q. Whether it was obtained at the dock of Swift & Company, or at the premises?

A. Our record would not indicate it. We would have no way of showing it.

Q. Do you recall of any individual shipments where you did do that? Where you picked it up in the Twin Cities or around the dock?

A. Yes. I recall there a place in Southeast Minneapolis where we picked up some lumber for making crates

for produce houses that we would move to La Crosse, Wisconsin.

Q. Any other places than at the plant of Swift & Company?

A. I do not dispatch the truck so I do not have the least idea. It has only been made on a Saturday afternoon, and there was some question about getting into the place. It was for that reason it was recalled to my memory.

Q. Isn't it true that at least the bulk of the shipments that were transported out of the Twin Cities and South St. Paul were obtained at Swift & Company's plant?

A. That is correct.

Q. And is the same thing true of Chicago?

A. No, the movement is more general in Chicago.

Q. Shipments inbound to Chicago, then, you delivered where besides the plant of Swift & Company?

A. There are many places.

Q. The nature of the places, Mr. Noble?

[fol. 336] Mr. Boyle: Mr. Examiner, I am raising the question this time definitely, to object, and I may be overruled; but nevertheless, I want the record to show my objection as to the immateriality of the questions. We have been over this. We can save time. It doesn't make a *practical* — difference upon what street in the town the delivery was made, or the pickup was made. The question here is this: I don't think I have heard it being seriously contended that when you were lawfully operating from Chicago to St. Paul and being restricted to dock number 18 of Swift & Company at Chicago, and dock number 17 in St. Paul, the question is territory. If I am wrong in that, all right, but I respectfully object to this. The question is immaterial. It is, to some extent a duplicate of what has gone before, although I admittedly, know it very well, and I object, and ask a ruling.

Exam. Peterson: Now, we covered Twin Cities and South St. Paul pretty well. I am not clear about the purpose of having that developed. What difference would it make as to whether Swift & Co. shipped it from its own dock or whether they directed the applicant to go to some other place of business to pick up a shipment for them.

Mr. Overmyer: Well, now, if your Honor please, you may recall that not long ago the Commission ruled upon

the carriers to advance their ideas with respect to limitations that should be imposed under the terms that were to be issued to contract carriers. In view of the fact that the Act provides that a man more or less of his own motion can [fol. 337] add contracts, it is very important that the full scope of his operation on July 1st be first determined in order that he may not have such a broad formula as to eventually cover almost any type of shipment. Now, in breaking down that operation and the like it was conceived to be entirely logical within the spirit of the act to confine contract carriage between the plant of a producer and the plant in another city.

Mr. Boyle: It was conceived by whom? Who had this brilliant conception?

Mr. Overmyer: I am deserving of your respect, Mr. Boyle. I will say so far as that is concerned one of the brilliant minds was Mr. Turney. I will say his argument was listened to fortunately with a little more respect than you care to listen to mine.

Mr. Boyle: I don't think this form of proceeding should continue.

Mr. Overmyer: That is why I say, if you will see I started out to ascertain, for instance, what he was doing outbound from Chicago.

Examiner Peterson: Yes.

Mr. Overmyer: To take care of the Twin Cities. Now, I want to know what he was doing inbound to Chicago, because I conceive that particular thing to be pertinent. In other words was he delivering to retail customers or was he delivering only to the plant, because, let us look at it in the other way, as time goes on he wants to add trucks and [fol. 338] the like. It is going to be very vital, I will say, to these carriers if the man has a right to deliver to every retail store in Chicago as opposed to the right to deliver to the plant of the producer for whom he had a contract. Likewise, as a matter of consistency with public interest, it is readily conceivable, it may be consistent with the public interest to permit the shipper to have contract carriage between his plant and that sort of thing when it is not consistent with the public interest to subvert common carriage in dealing with the customers themselves.

Mr. Boyle: May I have a ruling?

Examiner Peterson: Objection overruled.

Mr. Boyle: Exception.

By Mr. Overmyer:

Q. You said, Mr. Noble, that your scope of operation was a little broader when in Chicago. What was it? What type of delivery did you make in Chicago?

A. Oh, we made deliveries to the U. S. Yards. We made deliveries outside of the yards; we made deliveries to the cold storage plants; we picked up outside of the yards, such as I have indicated in various cases where supplies might originate in quantities sufficient to send our truck over there. I would say our general operation in Chicago was unlimited as to any restriction on our part as a service to Swift & Company. We were there to serve Swift & Company. I think our delivery slips will show shipments at North Chicago and downtown in Chicago.

Q. That does not quite answer what I have in mind.

[fol. 339] A. And competitors plants, such as rival packing companies, which is outside of the yard, I believe.

Q. Did you, for instance, then have anything to do with the retail trade of Swift & Company? Did you make any deliveries to the trade?

Mr. Boyle: Is this Chicago?

Mr. Overmyer: Yes.

The Witness: When the weather was cold.

By Mr. Overmyer:

Q. Have you any documentary proof that you can put your hands on to indicate deliveries, we will say, to retailers in Chicago?

Mr. Boyle: Just a minute now. Are you sure? Are you sure that you are able to distinguish between retailers and wholesalers, for instance?

The Witness: I would not be able to tell that.

Mr. Boyle: It is very difficult.

By Mr. Overmyer:

Q. As a matter of fact, the bulk of your shipments were delivered at the dock of Swift & Company at plants in Chicago, isn't that true?

A. I would say they would be delivered at the dock of various Swift & Company's associated plants, not necessarily Swift & Company's plant.

By Examiner Peterson:

Q. Subsidiary plants?

A. Subsidiary plants, and the fact is that Swift & Company did business with an endless number of concerns in Chicago. We would be just as apt to go directly to their [fol. 340] place of business to make the delivery as just to the yards. The fact of the matter is this, a delivery of that nature received an extra fee from Swift & Company. It was quite common to collect it.

By Mr. Overmyer:

Q. Did you say you had a representative in Chicago?

A. At the present time, yes, sir.

Q. With respect to July 1, 1935, did you?

A. No.

Q. Now, you also mentioned that this agreement, I believe, with Swift & Company remained in force up until the time you executed a bilateral contract with them?

A. That is correct.

Q. Do you have that?

A. There may have been one or two changes since that time.

Q. Do you happen to have that bilateral contract with you?

A. No, sir.

Q. How is it that you distinguish the bilateral contract and the contract you have attached to your application?

A. By the guarantee of about five million pounds of freight.

Q. Though, of course, you had no guarantee of any volume up to that time, is that true?

A. That is correct.

Q. Is that same thing true with respect to Libby & Company?

A. A certain definite minimum shipment is guaranteed.

Q. That guarantee came into being at the time of this bilateral contract that was entered into?

[fol. 341] A. That is right.

Q. Do those contracts run for any particular period of time?

A. I believe they run until such notice is given of cancellation.

By Examiner Peterson:

Q. You believe. Do you know?
A. Yes, sir.

Mr. Boyle: I think it is a general proposition that it has to run for sixty days.
The Witness: That is cancellation on fifteen days notice by either party.

By Mr. Overmyer:

Q. Now, did you enter into a bilateral contract with Kraft Phenix?
A. At the time, necessarily, yes.
Q. Do you remember what time that was?
A. Well, the law prescribed, on a certain date that a contract must be bilateral. The Kraft's contract was made bilateral with the rest.

Mr. Boyle: I assume the witness' statement that the law prescribed that is taken as a layman's statement. The Commission, Division 5 issued the order.
Mr. Overmyer: You mean ex parte 9-12?
Mr. Boyle: I forget the number.
Mr. Overmyer: So that we are all talking of the same thing.
The Witness: Yes.
Mr. Boyle: It is not a statutory Congressional enact-
[fol. 342] ment. It is Division 5. It has not yet been contested, one Commissioner dissenting, two agreeing.

By Mr. Overmyer:

Q. The contract with the Kraft Phenix you do not have with you?
A. No, sir.
Q. Are you sure that was a written contract?
A. Oh, yes.
Q. What was its effective date? When was it to go into force?
A. There was no effective date.
Q. But it was, you think—your best recollection is it was executed about June 1, 1935?
A. Yes, sir.

Q. No action—no shipments moved under it until 1936, is that correct?

A. That is correct.

Mr. Boyle: Your explanation of the gap between there will be supplemented by Kraft's witness who will follow some time this week.

By Mr. Overmyer:

Q. Do you have a copy of the agreement with Kraft Phenix now?

A. We have. As I explained before I have a portion of that agreement. I think a portion of it is lost. We have a portion of it on file. We could supply that particular contract, we believe, as Kraft probably keep a record more complete than we do of it.

Q. Is Kraft Phenix Company a packing house?

[fol. 343] A. They are a house dealing in sundry items along the cheese and food products line.

Q. Swift & Company, of course, is a packing house, isn't it?

A. Oh, no, Swift & Company is the house dealing in meats, packing house products. A big portion of their business is produce, poultry, butter, eggs and cheese.

Q. There was mentioned in one of these exhibits, canned goods carried by Swift & Company. Was that canned meats?

A. I would not be able to suggest which that one was. Swift & Company and Libby, McNeil & Libby, they can meats, they can vegetables, they can preserves.

Q. Swift & Company?

A. No, we are speaking of Libby, McNeil & Libby.

Q. You will pardon me. We will try to shorten it if you will just answer questions with respect to Swift & Company. When you referred to canned goods, do you mean canned vegetables, fruits, or do you mean canned meats?

Mr. Boyle: The witness may not know that Swift & Company is still operating under that old consent decree.

Mr. Overmyer: I don't think that they can put up or handle those canned vegetables.

Mr. Boyle: Milk, pork and beans and canned vegetables can be handled.

Mr. Overmyer: All right, I think that is all.

Examiner Peterson: Any further cross-examination?

Mr. Mattimore: Yes, I have some examination. Could [fol. 344] we have a little recess?

Examiner Peterson: Five minutes, yes, sir.

(A short recess.)

Examiner Peterson: Come to order.

Cross-examination.

By Mr. Mattimore:

Q. Did I understand you to say that your contract with Kraft Cheese Company was made in June, 1935?

A. That is correct.

Q. But you did not operate under it until March, 1936?

A. That is correct.

Q. So the first shipment that you moved for the Kraft Cheese Company under the contract was in March, 1936?

A. That is correct.

Q. How many trucks did you have in November, 1934, when you commenced your operations with Swift & Company?

A. Two trucks.

Q. How many have you now?

Mr. Boyle: We have covered that, but I don't mind the repetition.

The Witness: I have fifteen trailers; fourteen tractors, one truck with an insulated body on it.

By Mr. Mattimore:

Q. That would be a big job?

A. That is commonly called a straight job.

Q. I will call your attention to exhibit number 5, do you have that before you?

A. Yes, sir.

[fol. 345] Q. Now, can you find any freight bills or any shipments on that exhibit moving from South St. Paul to Eau Claire, Wisconsin?

A. No, sir.

Q. There are none?

A. No, sir.

Q. You did not move any freight between South St. Paul and Eau Claire, Wisconsin, between November, 1934 and July 1, 1935?

A. That is correct.

Q. Will you tell us when you commenced to move freight from South St. Paul to Eau Claire, Wisconsin?

A. Regularly in August, 1937.

Q. That is the first time that you hauled it?

A. I say regularly.

Q. What do you mean by regularly?

A. As to regular movements, as to continued movements.

Q. Prior to that time how often did you move it?

A. I haven't any information available without studying it, but I would say fairly rarely, if any.

Q. If any?

A. Yes, sir.

Q. Would you be in a position to show any shipments prior to that time?

A. It would require some time to study that.

By Mr. Boyle:

Q. Would they be in the exhibit?

A. They should be.

[fol. 346] By Mr. Mattimore:

Q. Should be what?

A. They should probably be in exhibits 8, 9, 10, 7, or 8 or 9.

Q. That would be after July, after August, 1937?

A. No. Exhibit 1 is for representative movements in '36, that is exhibit 7. Exhibit 8 covers 1937. So there might be a possibility of a movement in 1936 listed in the exhibit, possibly in the months, but not listed in the exhibits. However, we show no regular movements into Eau Claire prior to August '37.

Q. No regular movement?

A. No, sir.

Q. Now, what is the situation with reference to LaCrosse, the movement of freight from South St. Paul to LaCrosse, Wisconsin?

A. Well, we are——

Q. Having in mind exhibit 5?

A. Well, the exhibit speaks for itself. If it is so listed we moved the shipment.

Q. Was there any listed in there?

A. That would require an examination.

Mr. Boyle: If counsel has made an examination of that exhibit 5 and finds no shipments listed between those points and will so state, that will be sufficient for the record, but the exhibit will continue to speak for itself. If we discover one on the exhibit, of course, that would cover. Would that be sufficient rather than to take time to go all the way through it now that we have been through it?

By Mr. Mattimore:

Q. The Witness can answer it.

[fol. 347] A. It shows no shipment from South St. Paul to LaCrosse during the period, November 17th to July 1, 1935.

Q. Calling your attention, Mr. Noble, to exhibit 6 and showing the period between July 1, 1935 to October 15, 1935, I will ask you if that exhibit shows the movements of any shipments from South St. Paul by you to La Crosse, Wisconsin?

A. I believe it does.

Mr. Boyle: Page 2.

The Witness: Page 2 shows a movement.

By Mr. Mattimore:

Q. Page 2 shows a movement?

A. Yes, sir, July 26th.

Q. July 26th, 1935?

A. Yes, sir.

Q. That is a shipment—will you give us that bill on that, please? That is just box lumber?

A. That is what it shows.

Q. Turn to page 5, will you?

A. Yes, sir.

Q. You see that shipment about the third down from the top?

A. Yes, sir, LaCrosse, eggs.

Q. September 11, 1935?

A. Yes, sir.

Q. That is all that is on that shipment?

A. That is correct.

Q. Just eggs. Do you know of any others on that exhibit, from South St. Paul?

[fol. 348] A. The exhibit speaks for itself. To my knowledge those are probably the only shipments into LaCrosse.

Q. Out of South St. Paul?
A. Out of South St. Paul, yes, sir.
Q. What is the situation with reference to Rice Lake?
A. That is the shipment from Chicago made to Rice Lake.

Examiner Peterson: What page is that on?

Mr. Mattimore: I have not seen it.
The Witness: We can find it.

By Mr. Mattimore:

Q. Were there any shipments on that exhibit 5 for Rice Lake?
A. Rice Lake was in exhibit 5, if I am not mistaken. Are you waiting for me?
Q. Yes.
A. For what?
Q. Rice Lake shipment, what page?
A. January 25th, 1935.
Q. January 25th, 1935?
A. Yes, sir.
Q. From South St. Paul?
A. From Chicago.
Q. From Chicago?
A. Yes.
Q. There is none from South St. Paul?
A. No. The record speaks for itself. It shows the shippers, point of origin, Blue Island, destination Rice Lake.
[fol. 349] Q. My question, Mr. Noble, was as to any shipment for South St. Paul to Rice Lake?
A. No, no.
Q. You haven't any?
A. No.
Q. So there were no shipments made by you between November 7, 1934 to July 1, 1935 from South St. Paul to Rice Lake?
A. That is correct.
Q. What is the situation with reference to Rice Lake, between the periods, between July 1, 1935 and October 15, 1935?
A. I would say it is the same.
Q. No shipments made by you from South St. Paul to Rice Lake?
A. That is correct.

Q. I believe you testified, Mr. Noble, that there were certain towns that you were serving in Minnesota, there were towns in Minnesota that you claim to have served prior to July 1, 1935?

A. Yes.

Q. And among them was Faribault. Will you show us in exhibit 5 any shipments made by Swift & Company or any one else, hauled by you to Faribault, Minnesota?

A. The statement has been made by me to the effect that we have served Faribault prior to that time but it was an error as the map shows a circle. There appears no freight bill to Faribault.

Q. That was one of the nine towns you named?

A. I looked at the map, and it looked like a circle, as a [fol. 350] matter of fact, or a square, and it is a circle. That was a mis-statement as far as I was concerned relative to Faribault.

Q. Faribault was not served prior to July 1, 1935?

A. That is correct.

Examiner Peterson: Mr. Mattimore, while we are on this, Faribault is stricken as far as July 1 and prior thereto. It is stricken between July 1 and October 15, 1935 also?

Mr. Mattimore: I can go into that now. Yes, I will.

Mr. Boyle: According to the map it was not served prior to October 15, 1935?

The Witness: That is correct.

By Mr. Mattimore:

Q. That is correct, then, is it, Mr. Noble?

A. Yes, sir.

Q. It was not served prior to October 15th?

A. Yes.

Mr. Fiddes: Is it understood then that Faribault was stricken from the statement made by counsel and the witness here today?

Mr. Boyle: Counsel I did not make any statement about Faribault.

Examiner Peterson: Mr. Noble testified.

Mr. Boyle: He was reading from points on the map. He read that circle as a square. I think that is what it was.

Mr. Mattimore: Perhaps.

By Mr. Mattimore:

Q. What is the situation with reference to Mankato prior [fol. 351] to July 1, 1935?

A. Retail shipments from Chicago to Mankato prior to July 1. We located one here, of canned goods from Blue Island.

Q. That was June 7, 1935?

A. Yes, sir, that was delivered to the Dieke Transfer Company of Mankato, signed by them.

Q. That was the only one you find during that period?

A. That is the only one I found so far.

Q. Prior to June 1?

A. Yes.

Q. July 1?

A. There may be others. That is the only one I found so far.

Q. No, with reference to exhibit 6, Mr. Noble, July 1, 1935, and October 15, 1935, were there any shipments to Mankato?

A. That appears to be canned goods out of Blue Island.

Q. What kind of canned goods would that be?

A. Pork and beans.

Q. Pork and beans?

A. Yes, sir.

Q. Do you find any other on that exhibit, Mr. Noble, to Mankato?

A. I have not been checking it very closely. This is apparently a representative exhibit of what might have happened at Mankato.

Q. Calling your attention, Mr. Noble, to exhibit 7, that is the period of February 7, 1936, May, 1936,—no, Feb- [fol. 352] ruary, May and September, 1936, representative bills. Will you state whether there are any shipments on that exhibit, shown on that exhibit, from South St. Paul to either Eau Claire or LaCrosse, Wisconsin?

Mr. Boyle: Mr. Examiner, I would say again, in the interest of time that counsel, if he has made the characteristic examination that I think he has made of this exhibit and makes the statement he has not found any we will accept that statement as prima facie correct because the exhibit speaks for itself. If we find it isn't later we will point out in brief he is wrong. It seems useless to waste the time.

Examiner Peterson: Will that be satisfactory?

Mr. Mattimore: We just find this one for Eau Claire; none for LaCrosse.

Mr. Boyle: Where is the Eau Claire one?

Mr. Mattimore: The Eau Claire one is on page 9, South St. Paul and Eau Claire.

The Witness: The origin is Eau Claire. The origin is Eau Claire to Chicago. The destination is Chicago.

Mr. Mattimore: Then there are none as far as we have been able to determine from South St. Paul to Eau Claire or LaCross, during the period of February, May and September, 1936.

By Mr. Mattimore:

Q. Mr. Noble, calling your attention to exhibit 3, the appendix to the map showing towns, deliveries made in truck route distribution of plant sales, we have just developed [fol. 353] that you have made no shipments to Eau Claire prior to October 15, 1935?

A. That is correct.

Q. From South St. Paul?

A. Yes, sir.

Q. Now, I call your attention to the towns listed under break point Eau Claire on that exhibit?

A. Yes, sir.

Q. Designated by 1. That 1 is Swift & Company's route number, is it?

A. That is correct.

Q. There is Black River Falls, Wisconsin, Eau Claire, Wisconsin, Chippewa Falls, Fall Creek, Augusta, Fairchild, Neillsville, Granton, Marshfield.

Mr. Boyle: There is no use reading the exhibit.

Mr. Mattimore: I will finish this one.

By Mr. Mattimore:

Q. Chile, Marshfield, Brillion, Hixton, Alman Center, Hunberg, Price, Osseo, Strum, Eleva——

Mr. Boyle: I don't see the reason for reading them into the record, where it is already in.

Examiner Peterson: How many points are you naming?

Mr. Boyle: He is naming them all.

Examiner Peterson: What page?

Mr. Mattimore: On page——

Mr. Boyle: The first page of exhibit number 3.

Examiner Peterson: Can you refer to the page numbered [fol. 354] the exhibit?

Mr. Mattimore: I can perhaps have Mr. Noble describe it. It is not clear here to me and I don't think it would be clear to the Commission just which towns are on the routes covered. They have in red pencil 1 to 80 here.

By Mr. Mattimore:

Q. Will you explain, Mr. Noble, what route, route 1 means?

A. Group 1?

By Examiner Peterson:

Q. Route?

A. Route 1 is Swift Plant sales route where the salesmen make certain towns and those towns are used to designate route 1

By Mr. Mattimore:

Q. That includes the two towns following Eau Claire on the first page?

A. Route 1 has as its headquarters the town of Eau Claire and several of the towns listed in that group as to the original break bulk point of Eau Claire.

Q. Which towns named there in that exhibit belong to route 1?

A. I would have to have my dispatcher list those towns. I am not sufficiently familiar with the towns of Route 1, except that route 1 and route 80 are the two routes which were commonly moved prior to Eau Claire as the break bulk point.

By Examiner Peterson:

Q. The Commission would like to know what is the purpose of having those routes?

A. This is merely a designation as to what that territory and that particular route has been.

[fol. 355] Q. Yes. What points are involved in those routes? That is not helpful, just simply to state——

Mr. Boyle: Mr. Examiner, that will be more easily developed by the Swift & Company witness because these

numbers here are the Swift & Company numbers for their own convenience to key into the map. Just exactly in which route number, the witness who will follow Mr. Noble will indicate.

Examiner Peterson: Well, wouldn't the witness, the applicant know what points are involved in the routes? In other words, assuming that the Commission would not grant or is not going to grant territory and specific points, how is the Commission going to determine what points were actually served?

Mr. Boyle: As I understand these points are, points 1 and 80, routes 1 and 80, not being any official or not having any official status of any kind, they are merely the departmental number that Swift uses for sales accounting.

Examiner Peterson: Shouldn't the applicant know all the points he is serving?

Mr. Boyle: Oh, he can tell you the points he serves.

Examiner Peterson:

Q. Are there some points not mentioned in the exhibit?

A. Well, these towns here are the towns that are included in the salesman's territory who headquarters at Eau Claire and who headquarters at Chippewa Falls. Those towns are generally classified as towns which formerly were delivered to Eau Claire as the break bulk point of the plant sales [fol. 356] distribution.

Q. What significance do these figures have in connection with——

A. This is a location on the map.

Q. ——July 1, and prior to July 1, 1935?

A. That is after July 1.

Mr. Mattimore: Mr. Examiner, I think we can clear it up as far as we are concerned.

By Examiner Peterson:

Q. Oh, the connection with the shipment moving after October 15?

A. Yes.

Q. Only?

A. That is all.

Mr. Boyle: Yes, his testimony on direct, you will recall, Mr. Examiner, was, I think October 17th.

Examiner Peterson: Yes.

Mr. Boyle: When he first began making the deliveries on these routes.

Examiner Peterson: Yes, oh, yes.

By Mr. Mattimore:

Q. Mr. Noble, the two route numbers shown there, 1 and 80 cover all of the towns that are listed on that exhibit between what is listed here as break point Eau Claire, as underscored, and break point Jamesville which is underscored?

A. Yes.

Q. All of those towns listed between those two titles are in either 1 or 80?

[fol. 357] A. That is correct.

Q. There are three towns?

A. That is correct.

Q. Now, Mr. Noble, when did you first serve any of those towns?

A. August, 1937.

Q. August, 1937?

A. Yes.

Q. That is the first time you served any one of those towns in route 1 and 80?

A. Just a minute, with the exception of Marshfield. Marshfield had been served prior.

Q. Was that out of South St. Paul?

A. Probably out of Chicago. I think there is a shipment out of South St. Paul to Marshfield, if I am not mistaken.

Mr. Boyle: Now, for the general purpose of your questions I think, if I am not mistaken the idea is that he began service to these points in August, 1937, and not prior thereto?

Mr. Mattimore: That is what I am trying to get.

Mr. Boyle: There may have been some shipments. He is taking these points as a whole there.

The Witness: Generally speaking, continuous service to that area here was started in August, 1937.

By Mr. Mattimore:

Q. Prior to that time the Glendenning Transfer Company was serving that territory, was it not?

A. I know who was serving it. Glendenning Transfer Service was serving it.

[fol. 358] By Examiner Peterson:

Q. You say the continuous service had been begun in August, 1937. Did you have any service to those points before that?

A. I think they admit service into Marshfield at some time prior to August, '37. In fact, I think it was in—what is the date of that?

By Mr. Mattimore:

Q. It was prior to July 1st?

A. It was prior to July 1, 1935.

Q. Page 4. How much of a shipment was that, do you know?

A. 19683 pounds of cheese.

Q. From where?

A. It apparently was from South St. Paul.

By Examiner Peterson:

Q. What page?

A. I take it back. There is one thousand and seventeen pounds of cheese for which there is a bill signed by Central Cheese Company, dated March 18, 1935. Then we show another slip here dated 4-18-35, which Central Cheese signed for 243 Cheddars which weighed 19683 pounds, which I assume is probably—no, that is on a different shipment, but the notation we have is merely that Central Cheese has signed for the 243 Cheddar. This other one had a direct bill for 1017 pounds.

Q. The same date for both of them?

A. No. One seems to be 4-18-35.

Q. And the other?

A. The other is 4-17-35. I would say that originated at Marshfield—either as the direct destination or the point of [fol. 359] origin of that large shipment coming back.

By Mr. Mattimore:

Q. Calling your attention to page 6, or the sixth page of that exhibit, the title at the top, break point LaCrosse——

A. Yes, sir.

Q. ——that is Swift's route, number 52, isn't it?

A. Yes, sir.

Q. Now, then, below that in a red circle is the figure 47, indicating, as I take it, route 47 of Swift & Company?

A. Yes, sir.

Q. A similar symbol is the middle of the page, 67?

A. Yes, sir.

By Mr. Boyle:

Q. 67 or 69?

A. 67 it is supposed to be.

By Mr. Mattimore:

Q. On the next page the symbol 62, route 62?

A. Yes, sir.

Examiner Peterson: I don't find 62.

Mr. Mattimore: 62 is on the next to the last page.

Mr. Boyle: Opposite Prairie du Chien.

Mr. Mattimore: That is 62.

Examiner Peterson: Mine is 67.

Mr. Mattimore: 62 it should be. I take it from the map as 36.

Examiner Peterson: 36 instead of 56?

Mr. Mattimore: No, no, 56 is out. 36 now, opposite Fen-
[fol. 360] nimore, that is the last.

By Mr. Mattimore:

Q. Now, Mr. Noble, will you state whether or not all of those towns listed belong to those different route numbers?

A. I think so, yes.

Q. In other words, where you show a number, the towns opposite that number and continuing on down to the next number, belong to the previous number?

A. I am not sufficiently acquainted with the way we actually load the freight out as to whether 47 will take the towns from Richland Center down, but I will say, that these are the towns normally called on by the salesmen operating under Swift route numbers 52, 47, 67, 62 and 36.

Q. That comprises all of those towns?

A. Yes, sir.

Q. Will you tell us, Mr. Noble, when you commenced to haul for Swift & Company out of South St. Paul to those points?

A. August, 1937.

Q. Mr. Noble, this morning there was some testimony here with reference to when you commenced operation with Swift & Company in November, 1934, and you testified that you did not haul produce that fall or that winter, because it was seasonal?

A. That is correct. I did not say that.

Q. What did you say?

A. I said that produce is seasonal, that I was not there in the picture—I was in the picture too early, or at least words [fol. 361] to that effect to be involved in the movement of produce.

Q. You consider the season following early winter?

A. That is the season, yes, sir.

Q. So that you didn't call on any of them for Swift & Company?

A. That is true.

By Mr. Boyle:

Q. When you said long enough?

A. I had not been in business long enough to know there was such a thing as produce.

By Mr. Mattimore:

Q. When did you commence to haul produce for Swift & Company?

A. Oh, shipments directed to Chicago out of South St. Paul. We were included in all shipments or in many shipments from the time I began hauling for Swift as indicated in exhibit number 5, here, I believe, the items were cheese, produce, poultry, butter from origin of South St. Paul and St. Paul to eastern destinations.

Q. Now, isn't it a fact, Mr. Noble, that produce moves the year around?

A. Not from the standpoint of the rush Thanksgiving time. There is produce moving all the time, from the standpoint of our operation, which is an operation calling for service for Swift & Company, when they demand it. There is a seasonal movement as far as they are concerned where they require a rush of trucks to these various produce plants in the season.

Q. There is a substantial movement of that produce the year *year* around?

[fol. 362] A. I am not sufficiently acquainted with the produce business.

Q. You are hauling produce for them, are you not?

A. Oh yes, but as far as we are concerned the seasonal angle is from the produce houses, as far as Swift & Company's truck shipments are concerned.

Q. The Glendenning Service were hauling that previous to your contract with Swift & Company?

Mr. Boyle: What? Let us be specific. The question is a little broad. Will you make it more specific?

By Mr. Mattimore:

Q. You commenced your operation with Swift & Company on November, 1934?

A. That is correct.

Q. And prior to that the Glendenning Transfer Company were handling the operation for Swift?

A. A portion of it, probably.

Q. A portion of it?

A. Yes.

Q. They were hauling this produce out of Marshfield, Montevideo, Waseca, Ulm and Sauk Center, were they not?

A. I am not in a position to answer.

Q. You are familiar with highway number 12 to Eau Claire?

A. Yes, sir.

Q. Did you serve any intermediate points between South St. Paul and Eau Claire?

A. No, sir.

Q. Or on 53 between Eau Claire and Chippewa Falls [fol. 363] now or at any time?

A. I couldn't answer that at the present time.

Q. Do you know this, Mr. Noble, that you were not handling it?

A. Prior to July 1st, 1935, that is correct.

Q. You do know also that you were not in there serving any of those towns and intermediate towns prior to August, 1937?

A. That is correct.

Mr. Mattimore: I think that is all, Mr. Noble.

Examiner Peterson: Any further questions?

Mr. Edell: I have a few. At the outset before I start I think there is a correction that should be noted on this exhibit 2. This map, I suppose, is intended to be geographically correct?

Mr. Boyle: Yes, as near as we can get it.

Mr. Edell: Madison shows on U. S. Highway 16 in the exact location of Columbus, Wisconsin, purely an error. I think it should be noted on the record to straighten out the location of Madison.

Mr. Boyle: I assumed that we would not be permitted by exhibit number 2 to move Madison, Wisconsin some place it don't belong.

By Mr. Edell:

Q. You have seen exhibit 2?

A. Yes, sir.

Q. You are aware of the error in the location?

A. I have not examined it closely enough or compared it yet.

[fol. 364] Q. I think it would be very evident if you looked at it.

A. Madison certainly is not where it belongs as to Watertown anyway.

Q. As a matter of fact, Madison is located at the junction of this thing?

A. I think Madison belongs at Fort Atkinson.

Q. Just east of Dodgeville, at the center of those highways that is the intersection of 12?

A. Yes.

Q. And 14?

A. Yes. That is correct. Madison is where Portage is.

Q. No, Portage don't show on here.

A. Well, Portage is not listed. That is about the spot.

Q. Well, Madison should be on this highway directly east of Dodgeville at the intersection of the north and south highway?

A. That is correct.

Q. Mr. Noble, in connection with Mr. Mattimore's cross examination, you have admitted that exhibit 5 shows no outbound shipments to La Crosse during the period of November 17, 1934 to July 1, 1935; also, when I say outbound I mean from South St. Paul; also that exhibit 6 shows only two shipments outbound from South St. Paul; namely, a shipment of box lumber which appears on page 2 of that exhibit; a shipment of eggs which appears on page 5 of that exhibit. With the exception of those two shipments we have no proof of any operation between South St. Paul

and La Crosse prior to October 15, 1936. That is correct, is it not?

[fol. 365] Examiner Peterson: October 15, 1936 or '35?

Mr. Edell: '35.

By Mr. Edell:

Q. As a matter of fact, going into exhibit 7, the three months listed show no movement between South St. Paul and La Crosse. In order to shorten this, if I told you, Mr. Noble, that I made a careful check of your exhibit 5 and compared it, with the proof which you have here and stated there are inbound to La Crosse from Chicago, only two shipments shown, one of soap powder listed on page 8 of exhibit 5, and one of canned goods listed on page 19 of exhibit 5, will you admit that is a correct statement of facts?

A. That is correct.

Q. And in connection with exhibit 6 I have also made a careful study of it and the proof submitted and the exhibit shows only one inbound shipment from Chicago to La Crosse; namely, a shipment of soap listed on page 9 of that exhibit. Is that correct?

A. That is correct.

Q. So that prior to October 15, 1935, your whole operation into La Crosse consisted of a shipment of box lumber and a shipment of eggs from South St. Paul, two shipments of soap or soap products, one shipment of canned goods from Chicago or the Chicago area, the canned goods mentioned from Blue Island?

A. That is correct.

Q. You testified in connection with Mr. Mattimore's cross examination that you did not start the operation into Eau Claire until August, 1937?

A. That is correct.

[fol. 366] Q. That also includes the territory, I presume, on U. S. highway 53 south between Eau Claire and La Crosse, Osseo, Whitehall, Blair and those points all at one time?

A. Yes.

Q. I have also, in making my examination of your exhibit number 5 and of proof which you have here in support of it, found no shipments whatever between South St. Paul and Prairie du Chien during the period of November, 1934 to July 1, 1935?

A. That is correct.

Q. Nor do I find any shipments between South St. Paul and Prairie du Chien during the period of July 1, 1935 to October 15, 1935?

A. That is correct.

Q. I found only one shipment of canned goods which was apparently on a slip of paper consolidated with several other shipments around Fennimore, down in there, northbound from Chicago to Prairie du Chien?

A. That is correct.

Q. So that during the period prior to October 15, 1935, your operation into Prairie du Chien consisted of one shipment of canned goods?

A. If that is what the record states.

Q. That is what the record states. At the top of page 9 of your exhibit number 5, shipment to Rice Lake which Mr. Mattimore inquired about, will you find that in your list and tell us to whom it was delivered, and where? It is [fol. 367] the top shipment on January 25, 1935, a shipment from Libby, Blue Island, of canned goods to Rice Lake, Wisconsin?

A. What is the date of that, do you know?

Q. January 25, 1935?

A. That is signed Carey Transfer Company.

Q. Where is the Carey Transfer Company located?

A. Well, there is a Carey Transfer Company in Eau Claire. I would not be able to say whether they have an office in Rice Lake or not.

Q. Mr. Noble, there is a shipment directly next to that of canned goods consigned to Eau Claire?

A. Yes.

Q. Will you compare the signatures and tell us for the record whether it is the same company?

A. That was what I was attempting to do. The same man signed both bills.

Q. So instead of making a delivery of this shipment to Rice Lake, you were actually delivering it to the Carey Transfer Company at Eau Claire, Wisconsin?

A. That is correct.

Q. In your original statement you outlined the method of operation. You stated that prior to the time Swift & Company called you into a conference in February, 1935, for the purpose of putting on this service that you were making

deliveries to these break bulk points or distribution points, and you named quite a few of them, principally Wisconsin [fol. 368] Rapids, Rhinelander, Green Bay and so forth. Were those shipments all distributed at that time beyond the break bulk points?

A. By local draymen.

Mr. Edell: I think that is all the questions I have.

By Examiner Peterson:

Q. The local draymen only, not by other line haul operators?

A. No, local draymen in each instance.

By Mr. Edell:

Q. The local draymen did not deliver it to the rail carriers, did they?

A. The local draymen took it from the rail carriers and the truck then moved it; the local drayman was the local distributing firm.

Q. It was my understanding, Mr. Noble, from your testimony at the opening of this case that you were hauling consolidated shipments from South St. Paul to the break bulk point?

A. Yes.

Q. And that these break bulk points included the surrounding points?

A. That is correct.

Q. That in February, 1935, Swift & Company called you in to a conference with the result that you began to put on added equipment for the purpose of taking care of distribution beyond the break bulk point?

A. That is correct.

Q. It is your testimony, prior to that time the local drayman in these break bulk points was serving the surrounding communities?

[fol. 369] A. That is correct. The testimony was there was a meeting held in February.

Q. The testimony was you were called in to a meeting?

A. Yes.

Q. Prior to that time you were delivering to the break-bulk points namely Wisconsin Rapids, Rhinelander, Green Bay and so forth?

A. Our testimony states this service did not get under way until October, 1935. That while the original meeting was held in February I find out that everything was set to go and the first route that we started delivering store-door directly from the truck was in October of '35.

Examiner Peterson: October 17th.

Mr. Edell: I understood your testimony was prior to the time you were hauling from South St. Paul to the break-bulk points the consolidated shipments?

A. We continued to do that right straight through. We are doing some of that at the present time, routes we are not yet serving.

Mr. Boyle: I would like to get clear on this local drayman. To my mind, it has the significance of the fellow who is just teaming out to the city limits. I don't think that is the fact here. Your understanding of it, I think is right. The expression is inapt to say 'local drayman'. The fact was, there would be a carrier that would pick it up at the break-bulk point and make distribution to several towns.

The Witness: Well, if you would call him a carrier, he [fol. 370] was at that time what was called a local drayman, with two or three trucks that would take the shipments, break them out and send them in the trucks out to the territory, thirty-five or forty miles to these little towns.

By Examiner Peterson:

Q. Some of those local drayman, don't they operate now with line haul carriers?

The Witness: That I couldn't say.

Q. Have they filed their application with the Interstate Commerce Commission?

A. In these certain points in here I don't believe any of them have. Of course, I am not in a position to talk. I don't know about the other man's business.

By Mr. Boyle:

Q. Swift & Company would be able to tell us much more about that?

A. As far as I know of it, those men that were previously hauling were confined purely and simply to the movement of freight after the merchandise reached the break bulk point. The time we were hauling, or prior, at least, to my

knowledge there was no one but the local draymen were in competition with me as to the movement of merchandise to the break bulk point.

By Examiner Peterson:

Q. Prior to October 17, 1935, weren't the operators, like the Glendenning Transfer Service serving some of those points?

A. We have indicated we made no drop shipments to break bulk points, Eau Claire to LaCrosse; that service of store-door deliveries had already been established for those [fol. 371] routes that are close to Minneapolis. These break bulk shipments that were still going by car or truck under seal to a definite destination were for towns east of Eau Claire and LaCrosse.

Q. They had not been served except by what you call local draymen?

A. That is correct.

By Mr. Edell:

Q. Mr. Noble, you testified that between November, 1934 and February, 1935, Swift & Company trucked to break bulk points and cited as examples Wisconsin Rapids, Rhinelander, Green Bay and so forth?

A. Yes, sir.

Q. During that period between November, 1934 and February, 1935, did you perform the trucking service to those break bulk points?

A. I did.

Q Including Green Bay?

A. No. I showed Green Bay as a point from July 1st to October 15th.

Q. Well, I wasn't going by your exhibit, I was merely making the statement that you made in the record?

A. You made the statement that we hauled to these various places. You did not specify a date at the time you were talking.

Q. That is what I am trying to get straightened out. You were hauling, however, between November, 1934 and February '35, to Wisconsin Rapids and Rhinelander?

A. The record shows the towns that we maintained, that [fol. 372] we had made this break bulk delivery to. I can't

say as to if it was Rhinelander. We probably did not hit Rhinelander until March.

Q. I don't know. I am asking you. I did not search your records. I am merely citing the statement you made in the record in your general remarks as to your operations.

A. Between the time of November 1934 and the time that you have in mind we served the following break bulk points,——

By Mr. Boyle:

Q. At which time?

A. 1934 to February, 1935 we had already served the following break bulk points: Ottawa, Illinois, Antigo, Wisconsin, Watertown, Wisconsin, Beaver Dam, Wisconsin, Janesville, Wisconsin, Burlington, Wisconsin, Kenosha, Wisconsin, Wausau, Wisconsin. That would take to the 23rd of February. I believe it was some time in the latter part of February, at which time this discussion came up.

By Mr. Edell:

Q. Then until after this discussion, and after you had equipment on the road, which was some time in October, 1935, you continued just to serve the break bulk points, is that right?

A. To Chicago.

Q. I am speaking only of Wisconsin. I am speaking only of this plant sales transportation.

A. That is correct.

Mr. Edell: That is all.

Mr. Van Osdel: I have a couple of questions.

Examiner Peterson: Maybe you want to ask him after [fol. 373] I get through?

Mr. Van Osdel: It doesn't make any difference.

By Mr. Van Osdell:

Q. Mr. Noble, I find from checking with the reporter's record, that I did not get an answer from you with respect to Exhibit, that is, page 18, exhibit 6, page 18. I had designated it as shipment 37. Do you have that before you? It is the first one on the page?

A. Yes, sir.

Q. It is the tenth month, four day, 1935, from Chicago, Illinois to Minneapolis, Minnesota, Grand Forks, North Dakota, Fargo, North Dakota of peanut butter; and have you look at the original record, and I asked you if we could change the Grand Forks and Fargo, North Dakota to Twin Cities. I thought you said yes. The record discloses you said nothing. We passed on to the next one. So you better check that.

A. I will say "yes".

Q. Yes. Now, then, my second and last question, is one I missed on page 1 of this exhibit. Do you have page 1?

A. Yes, sir.

Q. It is the fourth one from the bottom of the page 7-13-35, Swift & Company, South St. Paul to Detroit Lakes, Minnesota, and Breckenridge, box lumber. I shall signify that as shipment number 40. If you will look at the original record and tell me, as a matter of fact, if it did not stop at the Twin Cities.

A. Well; I would say that is a shipment from South St. [fol. 374] Paul to Breckenridge as an intrastate shipment.

Q. Yes, that was an intrastate shipment, was it?

A. Yes.

Q. To the Detroit Lakes, Minnesota, that shipment would also be intrastate?

A. Yes.

Q. Both shipments would be intrastate?

A. Yes.

Mr. Edell: That is all I have. Thank you.

Mr. Boyle: Off the record.

(Discussion off the record.)

Examiner Peterson: One question.

By Examiner Peterson:

Q. Mr. Noble, have you transported shipments for Armour & Company?

A. From Chicago, yes, sir.

Q. Just from Chicago to what point?

A. Oh, Minneapolis and St. Paul. I would not be able to answer any further than that.

Q. When did you begin serving them?

A. I served them in November, 1934. Unfortunately I moved a load of canned goods for them and wrecked it

down here at Stewartville, Minnesota, my first one in the trucking business. I knew I moved those canned goods from Belvidere, Illinois to St. Paul and Minneapolis. I followed it with irregular shipments. I would not be able to show any shipments, I don't believe, after I had started [fol. 375] working for Swift & Company up until '36 or '37, but up to '36 and '37 and '38 I can show shipments occasionally from Chicago.

Q. There was a period you did not serve Armour & Company?

A. Yes.

Q. For how long, how many months?

A. I couldn't answer that. We had a contract on record from them ever since November, 1934. In other words we moved that first shipment in November.

Q. That has been in effect?

A. That has been in effect ever since.

Q. Is that a bilateral contract?

A. That has been revised to a bilateral contract. It is on file with the Commission, and it is confidential.

Q. Have you hauled for Wilson & Company?

A. Yes, sir.

Q. When did you begin hauling for them?

A. After we received an amended authority from the State of Wisconsin dated the 4th of May, 1936, for the permission to go on any highways, except certain specific ones which are limited to all we hauled for Wilson & Company, Cudahy Packing Company, and proceeded to move merchandise or freight for them under a contract which apparently was signed a few days later after this authority.

Q. The points that you served for Wilson & Company, were they the same points as you served for Swift & Company?

A. No. They are within the territory from, principally [fol. 376] from Chicago to Albert Lea, Chicago to Faribault, Faribault to Chicago.

Q. Let us say from Chicago to Albert Lea.

A. Yes.

Q. Then, what, from Chicago——

Mr. Boyle: Albert Lea, Minnesota.

Examiner Peterson: Albert Lea, Minnesota.

The Witness: In between those points, between Faribault and Chicago, between Plymouth, Wisconsin, and Albert Lea, between Manorville, Minnesota, Plymouth and Green Bay.

Q. Are any of those shipments listed as any of your shipments?

A. They would be listed by letter, I suppose, 34 and 38.

By Mr. Fiddes:

Q. When did you start hauling for Wilson & Company?

A. May, '36, and the authority that we have was signed.

Mr. Fiddes: That is a conclusion.

By Examiner Peterson:

Q. Have you hauled any shipments for the Cudahy Packing Company?

A. Yes, sir.

Q. When did you begin serving them?

A. It was immediately after the 4th of May.

Q. That was immediately after the 4th of May, 1936?

A. 1936.

Q. What points did you serve the Cudahy Packing Company?

A. Cudahy has been served primarily between Chicago and St. Paul and St. Paul and certain points in Wisconsin.

[fol. 377] Q. What points in Wisconsin?

A. Beaver Dam, Portage, Madison, Monroe, Waupun, Berlin, Ripon, Tomah, Mauston, Watertown, Oconomowoc.

Q. You never served those points for Swift & Company?

A. Oh, yes, we served practically all of those.

Q. I mean before July 1, 1935?

A. Oh, yes. We served Beaver Dam. We served—they all mixed in on that general territory.

Q. I am talking about specific points. You say you did serve Beaver Dam?

A. We served Watertown.

Q. What other points?

A. Madison.

Mr. Fiddes: He means, I take it, the documentary proof shows it.

Examiner Peterson: He has got documentary proof.

The Witness: Documentary proof.

Mr. Fiddes: It would speak for itself.

The Witness: It will speak for itself.

By Examiner Peterson:

Q. Did you serve Tomah?

A. Tomah. We haven't any record of serving for Swift prior to July 1st and October 15th, except as a town in the break bulk group—North Freedom.

Q. Ripon?

A. Ripon is in the territory of the Beaver Dam truck. So that particular town was in the break bulk group of the Beaver Dam territory.

[fol. 378] Q. Have you served, made shipments for Northern Packing Company?

A. We hauled for Northern Packing Company after July, 1935, inbound from Grand Forks to the Twin Cities. Then there is a period of '36 and part of '37 that we operated for the Northern Packing Company.

Q. Then you are not hauling for them now?

A. No.

Q. Are you hauling for Cudahy Packing Company now?

A. Yes, sir.

Q. Are you hauling for the Northern Packing Company now?

(No response.)

Examiner Peterson: He said no. And I asked him if he is hauling for the Cudahy Packing Company and he said yes.

Mr. Van Osdel: Did I understand him to say he was hauling for the Northern Packing Company, say out of Grand Forks to where?

The Witness: Twin Cities.

By Mr. Van Osdel:

Q. That was you say, some time in the beginning of 1936?

A. I think the latter part of '36, and a portion of '37.

Q. The latter part of '36 and the first part of '37. That has been discontinued?

A. Yes, sir.

Mr. Van Osdel: Thank you.

By Examiner Peterson:

Q. You say you are hauling for Wilson & Company. [fol. 379] Have you hauled for subsidiaries of Wilson & Company? What are their names?

A. I would not know their names.

Q. Didn't you file a certificate M. F. I. C. C. effective October 15, 1937, stating that you hauled for Wilson & Company and subsidiaries? You don't know what the subsidiaries are?

A. I would have to see the contract to see what it says in there.

Q. Your contract provides for subsidiaries?

A. Yes, sir. In other words, if Wilson & Company give a shipment to some place I don't know who the subsidiary is. We are doing this for Wilson & Company.

Q. Have you hauled for Dalton Stevens Company?

A. Yes, sir.

Q. When did you begin hauling for them?

A. I think it is along in '37, Stevens.

Q. What shipments—what kind of business are they in?

A. They are a wholesale grocery business. Our movement has been primarily canned goods, from points in Wisconsin.

Q. What points in Wisconsin?

A. Manitowoc, Wisconsin.

Q. Is that listed in your exhibits Nos. 7 or 8?

A. If it happens to fall in the months involved. We have taken a representative picture of '36, '37 and '38 business. If there was a shipment in that particular month that would [fol. 380] be listed in that month. I would not be able to tell you if it was in the particular months involved.

Q. Have you hauled for them regularly and continuously and what have you moved?

A. We moved their carload shipments as those shipments appear.

By Mr. Fiddes:

Q. For whom?

A. Gordon Stevens.

Q. Is that all you hauled, carloads?

A. Truck loads.

By Examiner Peterson:

Q. I am not clear as to between what points?

A. They would be points in Wisconsin. In other words, if the Gordon Stevens decides to buy a truckload of canned goods in any town in Wisconsin, our truck provides this

move for a truckload of merchandise into St. Paul or Minneapolis to its destination, Gordon Stevens.

Q. Did you haul any canned goods for any one from points in Wisconsin to the Twin Cities before or on July 1, 1935?

A. Well, the record will state whether we have. I am not sufficiently acquainted with every detail in the record, but the record will develop that.

Q. Have you hauled for Walter E. Tierney Company, St. Paul?

A. Yes, sir.

Q. What kind of business are they in?

A. They are food brokers, manufacturers' agents.

Q. Well, a food broker, how do they operate?

[fol. 381] A. They are manufacturers' agents in this territory for certain food concerns who make volume production. They sell in carloads of one item or a truck load of one item, whatever the shipment may be. They are the Twin City representatives of that firm.

Q. How many firms do they represent?

A. I couldn't tell you. Our experience has been with only these firms.

Q. You mean these products?

A. Food products, canned goods primarily.

Q. Wouldn't they deal in any kind of commodity?

A. I couldn't answer for Tierney.

Q. Haven't you hauled for them all kinds of commodities?

A. No. We confine ourselves to their truckload movements.

Q. Of what?

A. Of food stuff.

Q. Well, there are a lot of food stuffs, canned goods and what else?

A. I can't answer that because I would not be in a position to know what these products are. We are taking these under general commodities for the Tierney Company, to move them to destination from points of origin within the territory that we have made application for. If they are covered in the schedule of minimum charges that we have on file, why, we will move them provided they give us enough tonnage in the shipment so that we are interested in the movement.

[fol. 382] Q. Any kind of a commodity?

A. Yes. That would be true, provided it is one that is listed in our list of commodities furnished by the schedule MF I. C. C. schedule 15.

By Mr. Boyle:

Q. You have an agreement with these people?

A. Yes, in the office of the Interstate Commerce Commission, Washington, D. C. Confidential file.

By Examiner Peterson:

Q. So the Walter E. Tierney Company may make arrangements with almost any shipper or consignee to turn the shipment over to you?

A. You understand Walter E. Tierney Company, the same as any other food broker under this business—they would not permit him to spread out too much. He is a manufacturers' agent, and you can't get too many lines when you are a manufacturers' agent, because the manufacturers are interested in moving their particular line of product, so it necessarily would mean that his contract would be confined to probably a few products. It is those contracts where they have volume that they propose to move.

By Mr. Fiddes:

Q. Do you haul for Darling Company?

A. We haul for Darling. Tierney is the man who gives the shipping orders in the Twin Cities.

Q. He is the shipper. Does he pay the freight?

A. Not necessarily. He may pay the freight and he may not. The shipper may pay the freight and the consignee may pay the freight. He is representing the shipper in the arrangement for freight.

[fol. 383] By Examiner Peterson:

Q. Has he ever paid the freight?

A. I think so.

Q. Do you know?

A. I am not in a position to say. I do not sit there in the office and check these bills when they come in or out. Our arrangements are with the Tierney Company. The

Tierney Company calls in and gives us an order. Our dispatcher proceeds to make the delivery on the order under the conditions of the contract that we have with the Tierney Company.

By Mr. Fiddes:

Q. When did you start to haul for the Tierney Company?
A. About a year ago.
Q. October or September, 1937?
A. That is probably right.
Examiner Peterson: That is all.

By Examiner Peterson:

Q. I would like to have, and perhaps the map and the application shows the routes that you have specified in exhibit A-2-A-1?

A. No, that does not show the routes at all. Those are merely representative routes. This map merely shows the U. S. Highway. The exhibit shows many and various sundry routes in the State of Wisconsin that are used to get to the final destination, showing that we had no regular route as far as to the various points in question.

Q. But doesn't Exhibit A-2-A-1 indicate that you claim service over particular highways?

[fol. 384] A. The function of that exhibit was merely to answer in some broad way the fact that we have been on many routes. We list a certain number of them, but only with the line stating and other miscellaneous roads and highway within the states of Wisconsin and northern Illinois.

Exam. Peterson: Any further questions?

By Mr. Fiddes:

Q. The Gordon Stevens Company and Walter E. Tierney Company, you said you hauled for them in truckload lots. Is that true of any of these others, Cudahy, for instance?

A. Our arrangement under our schedule of minimum charges that contracts on file call for truckload lots, unless agreed upon.

Q. You principally haul truckload lots for Cudahy and Armour?

A. That is our business.

Q. That is true for Wilson, too?
A. Yes.

By Exam. Peterson:

Q. Are your contracts with Armour & Company, Wilson & Company and the other packing companies similar to the ones that you have with Swift & Company?
A. They are, yes, sir.

Exam. Peterson: That is all.
The Witness: I might show, if you are interested in seeing them, these bills in question on that seasonal operation out of Marshfield that I think was involved in this Detroit Lakes. The question came up. The question developed [fol. 385] as to whether there were movements out of those places of a seasonal nature.
Mr. Fiddes: Yes.
Exam. Peterson: Have you seen these, Mr. Mattimore?
Mr. Mattimore: No, I have not.
Exam. Peterson: So-called seasonal operations. We will have a few minutes recess.

(A recess was had.)

Exam. Peterson: Any further cross examination?
Mr. Edell: I might ask him one question I forgot.
Mr. Boyle: I don't mind, it would expedite matters a little if counsel would conclude their cross examination in one session.
Exam. Peterson: They will do that.

By Mr. Edell:

Q. The statement that you made, Mr. Noble, with reference to the inauguration of service from South St. Paul to LaCrosse and Prairie du Chien belongs equally to that territory between LaCrosse and Prairie du Chien, Wisconsin, highway 35 to De Soto?
A. The entire territory is the territory that we started store-door delivery in August, 1937.
Q. Prior to that time you had not made any shipments?
A. Prior to that time I had not made any shipments.
Mr. Fiddes: Yes.
Mr. Edell: That is all, thank you.

By Mr. Van Osdel:

Q. Mr. Noble, you have handed to us a group——

[fol. 386] Mr. Boyle: Off the record.

(Discussion outside the record.)

Mr. Boyle: On the record.

Examiner Peterson: Mr. Boyle, may I ask a question?

Mr. Boyle: Yes.

Examiner Peterson: The protestants have examined the freight bills and other documents that you have covering shipments that moved up to October 15, 1935, and it is my understanding the applicant has testified that the shipments that moved up to that time, October 15, 1935, have been continuous; that you have the freight bills and bills of lading here for inspection by the protestants?

Mr. Boyle: That is correct.

Examiner Peterson: But you are not willing to let them examine them in the same way as you have let them examine the freight bills and bills of lading covering the shipments that moved prior?

Mr. Boyle: I didn't know that point had come up. I understood at the time we came to our agreement that they wanted the freight bills on and prior to October 15, 1935.

Examiner Peterson: Yes, but the question arises as to whether you are offering them.

Mr. Boyle: We will answer any question as to shipments subsequent to October 15, 1935.

Examiner Peterson: Maybe this will cover it. Now, are [fol. 387] there any protestants that question the continuity of the operation prior to October 15, 1935, that is, question the continuous movements of shipments to and from the points that were continuous up to October 15, 1935? I understand that the protestants do not question that but they contend that there were a lot of points added.

Mr. Boyle: Oh, yes, we said that.

Mr. Fiddes: What you ask, Mr. Examiner, is as to the accuracy of the exhibits that purport to show continuous movements?

Examiner Peterson: Yes, the exhibits.

Mr. Fiddes: We do not admit by looking at the freight bills that these showed continuous movement until we analyze them. You now inquire whether we admit whether

these cover operations for the years 1938 and '37, and correctly reflect what they purport to reflect?

Examiner Peterson: Yes.

Mr. Fiddes: I don't know whether it was a continuity of movement. I can't question that until we have examined the exhibits. We have not analyzed them, naturally.

Examiner Peterson: There is nothing that has been raised in your mind now as to continuous movement?

Mr. Fiddes: For my part I am frank to say in the course of trying the lawsuit I have not had time to analyze it. It shows an operation by this applicant. That is something that is ordinarily done when you prepare a brief.

Examiner Peterson: How much more time do you want? [fol. 388] Mr. Fiddes: I am not asking for any more time. We just ask for time to question him as to the continuity. I can't question it or admit it until I have analyzed the exhibit.

Examiner Peterson: One of the protestants told me a while ago off the record that the document had not been offered for inspection.

Mr. Boyle: It would be a good idea if the protestants would make their statements on the record.

Examiner Peterson: Mr. Van Osdel, will you make that statement on the record?

Mr. Van Osdel: I called the attention of the Examiner that there seemed there was going to be produced some original records concerning the years, or months of October, November and December of 1937 for our inspection. What I called to the attention of the Examiner was so far as that particular period was concerned; namely, '36, '37 and '38, we had not had that opportunity to examine the original record on the shipments that were set out in exhibits 7, 8 and 9. Do I make myself clear? It seemed that we were going to go into the original records of 1937. We did start with going into the original records that year wherein there had been exhibits submitted and didn't start in where there had been no exhibits concerning that movement.

Mr. Boyle: I think we can clarify that part of it, if I understand you. The only purpose in bringing these over was in answer to questions, if my memory serves me correctly, which came from the Bench when some motion was made about seasonal movements, and it appeared that three [fol. 389] months selected in some particular year, the record might show what it is and did not include it. Mr.

Noble said that there was a movement in some of the other months and he sent over to get those bills. It is not my purpose to carry on and get this record any more encumbered than it is.

Examiner Peterson: Mr. Boyle, that is not the question. There are a lot of shipments listed on exhibits 7, 8 and 9, and protestants have not gone over the documents in support of those exhibits.

Mr. Boyle: Yes, I was answering Mr. Van Osdel with respect to these first.

Mr. Fiddes: When this case was called for hearing, when we first asked to see the supporting documents we were told because of some statute or authority it was illegal to look at them. After considerable discussion it was brought out we could at our own pleasure go through these original documents relating to shipments carried up to and prior to October 15th, but I didn't understand that the declining to let us see them was relaxed concerning the further period. That is what Mr. Van Osdel means as to the further period beyond October 15, 1935, as to that period we have not been proffered the privilege to go through their freight bills. I take it if Mr. Boyle would state that any protestant who wishes to see any freight bill relating to any shipment on exhibits 7, 8 and 9 could see it, that would constitute a sufficient proffer of the bills.

Mr. Van Osdel: That is right.

[fol. 390] Mr. Boyle: I should be glad to give them any they want.

Mr. Fiddes: They have been proffered to us. If there is anything in these, I understand the applicant is willing to do so.

Mr. Van Osdel: My thought is we certainly would voice no objection to your reading into the record any original records where as yet we have not had an opportunity to look at the original records or be informed of their contents as appeared in exhibits 7, 8 and 9. I don't think the purpose for which these particular documents were brought over would probably be clear to anybody. I think we are wasting time now.

Mr. Boyle: It was with the idea that if the Examiner wanted to ask anything about them—my recollection was he asked some question. We are perfectly willing to tender them to him. We will say no more about this.

Examiner Peterson: I asked if they relied—if they wanted to continue operating from those points.

Mr. Fiddes: That is just the point of my objection on which I made objection to; and I will now make; and the form in which the question has now again risen, they are offering these in this hearing by bringing in some freight bills to show us the movement of certain turkeys and poultry from certain towns. The movement they purport to show was 1937. If it has any bearing in this case at all it is to show a continuous continuity of that operation following the proof that it had occurred prior to July 1, 1935.

Mr. Boyle: It is admitted that it did not.

[fol. 391] Mr. Fiddes: It is admitted there was no proof prior to 1935 and that the operations in 1937 could have no materiality unless it shows continuity of operation.

Exam. Peterson: The Commission might want to tell the applicant to cease it and desist from operation. If they do not know what the operation is how can they do it?

Mr. Fiddes: My objection goes to the purpose of proving grandfather rights by this evidence.

Mr. Boyle: It is understood that I disagree with counsel in his interpretation of the law. I appreciate his point.

Exam. Peterson: State on the record the point of origin, the destination, periods between which the shipments moved.

Mr. Boyle: I was not going to do that. I will furnish anything the Examiner asks for.

Exam. Peterson: You are relying, and you want to continue doing that. The applicant wants to continue that operation. We do not know what the operation is.

Mr. Boyle: Is it sufficient to state it is a movement of dressed poultry?

Exam. Peterson: What else; eggs?

The Witness: Butter.

Mr. Boyle: Butter, dressed poultry out of Faribault.

Exam. Peterson: To where?

Mr. Boyle: Wilson & Company, Chicago.

Exam. Peterson: All right.

[fol. 392] Mr. Boyle: Wait a minute. That seems to be in December, 1937.

Examiner Peterson: All right, how many shipments?

Mr. Boyle: I have only three here.

Examiner Peterson: All from Faribault?

Mr. Boyle: Yes, sir. All Wilson; a shipment of dressed turkeys in December, 1937, from Detroit Lakes, Minnesota, to Swift & Company, Chicago; dressed turkeys, dressed poultry in November, 1937, from Sauk Center, Minnesota, to Swift & Company, Sheboygan, Wisconsin, and to Swift & Company, final destination, Detroit, Michigan.

The Witness: That is Chicago.

Mr. Boyle: That would be Chicago, I am told. Swift & Company, to Milwaukee, also from Sauk Center, and a group of shipments from Marshall, Minnesota, all appearing to having moved in December, 1937, for Swift & Company, poultry, Swift & Company, Gary, Indiana, which would be Chicago; Chicago, Roseland, Chicago. There was one to Gary. The rest are all Chicago, and by the rest, I mean eight.

Mr. Edell: They all moved on the same day?

Mr. Boyle: Very close to it.

Mr. Edell: I wonder if they were consolidated in the same shipment?

Mr. Boyle: The document here which might be called a shipping ticket indicates December 15, 1937.

By Mr. Boyle:

Q. On all of those were they Marshall shipments probably [fol. 393] all in one load?

A. Yes.

Mr. Boyle: That is all I have here.

Exam. Peterson: All right. If there is nothing further, the witness is excused.

Mr. Boyle: Just a question or two, please.

(Off the record.)

(Discussion outside the record.)

Mr. Boyle: On the record, I guess beginning with—I think it looks like number 7, that will be the 1936, and on the first page, origin, South St. Paul, destinations, for instance shown is Beaver Dam, and points on car routes and shown down for each trip enumerated. I just want it understood that means points on the car routes at which Beaver Dam is the principal point as shown on the exhibit 3, the car route. That is true all the way through there. That is all. I have here, if the Examiner please, a copy of the original

contract of Swift & Company, dated November 1st, 1934, to which reference has been repeatedly made. I understand this has been compared with the original and we believe it to be correct. If that be given an exhibit number, I will be glad to distribute it.

Mr. Van Osdel: That was the one that was supposed to be exhibit 1?

Mr. Boyle: That was the one that was supposed to be exhibit 1. That is correct. This would be exhibit 1. So then this is a substitution for what has been first of all [fol. 394] referred to as number 1. Let us call it revised.

Examiner Peterson: Withdrawn and now substituted?

Mr. Boyle: Yes.

Examiner Peterson: Mr. Boyle, you offer exhibit 1? Exhibit number 1 is received.

(Applicant's Exhibit number 1, Witness Noble, received.)

Mr. Boyle: I offer a copy of the Wisconsin license to Noble, issued on the 24th day of November, 1934, together with a copy of the certification of Calmer Browy, Acting Director, which is merely the certification, the original of which may be inspected, but this is—

Examiner Peterson: The original?

Mr. Boyle: In the file. It is merely for the convenience of the others.

(Applicant's Exhibit number 10, Witness Noble, identified.)

Examiner Peterson: It is received.

(Applicant's Exhibit number 10, Witness Noble, received.)

Examiner Peterson: In two pages, being the certification, a copy of the certification and a copy of the license.

Mr. Boyle: Also of the license issued to Noble by the State of Minnesota, the date being January 14, 1935. Is that correct? That is in one sheet, may that be marked exhibit 11?

[fol. 395] (Applicant's Exhibit 11, identified)

Examiner Peterson: Exhibit 11 is received.

(Applicant's Exhibit 11, Witness Noble received)

Mr. Boyle: Let me ask this:

By Mr. Boyle:

Q. Is there anything else you think of that you wish to offer?

A. I think I have said enough.

Mr. Boyle: That is all with Mr. Noble.

By Mr. VanOsdel:

Q. Just a minute, Mr. Noble. In connection with these exhibits that have just now been introduced, the exhibit which turned out to be number 1, a contract with Swift & Company, dated November 1st, 1935, if my memory serves me, was the original contract you had with them?

A. That is the original contract.

Q. Is that contract still in force and effect?

A. That has been superseded by the bilateral contract according to law.

Q. You still have a contract, a written arrangement?

A. Yes, sir.

By Examiner Peterson:

Q. In this connection I would like to ask one question, Mr. Noble. That is, your bilateral contract, you say, is cancellable within fifteen days?

A. Yes.

Q. They agree they will furnish five million pounds?

A. Yes.

Q. Of freight during what period?

A. Well, they agree to furnish five million pounds of [fol. 396] freight. When the five million pounds are gone, why, the contract is cancellable. I couldn't tell you the terms other than it is probably a period of time of a year.

Examiner Peterson: It is cancellable within fifteen days. It doesn't amount to anything.

Mr. Boyle: If they cancel it the first week in the year they would be liable for five million pounds of business. If within four months they have shipped five million pounds they can cancel it.

Examiner Peterson: What if they cancel it before the year is up, before they furnish the balance?

A. They are liable to pay the freight. In view of the fact that we have hauled 140,000,000 pounds for them thus far, 5,000,000 doesn't mean very much.

Examiner Peterson: That is all. We will adjourn until seven o'clock.

(At 5:20 P. M. adjourned until 7:00, o'clock P. M.)

Evening Session: 7:00 P. M.

Examiner Peterson: Let us proceed with our next witness.

Mr. Boyle: Call Mr. Metzger.

A. J. METZGER, was sworn and testified as follows:

Direct examination.

By Mr. Boyle:

Q. Give your name.

A. A. J. Metzger.

[fol. 397] Q. Your position?

A. Employed by Swift & Company, in the Transportation Department at South St. Paul.

Q. How long have you held that position?

A. For the past twenty years.

Q. Has it been a part of your duties in that position to have immediate contacts with the transportation of Swift & Company's products from and to South St. Paul by truck, motor truck or motor transportation? I have special reference to motor trucks at the present time.

A. Yes.

Q. Naturally that would include rail transportation and all other transportation?

A. Yes, sir.

Q. In connection with the operation of the transportation department and your duties therein, are you in immediate and constant contact with the sales department?

A. Daily.

Q. The transportation department is really in much of its work an allied department with the sales department, is that true?

A. Yes, sir.

Q. Now, to shorten, if possible, the examination, Swift & Company has a contract with the Noble Transit Company, the motor carrier applicant in this case, has it not?

A. Yes, sir.

Q. The contract was entered into in November, 1934?

[fol. 398] A. That is correct.

Q. Now, will you start from that time, Mr. Metzger, and describe the business of Swift & Company that was turned over to Noble, the method of that operation immediately before and on that date with subsequent development through 1935, with special reference to the period, first of all before July 1, 1935?

Mr. Fiddes: May I inquire what is the purpose of having him describe the operations before?

Mr. Boyle: I mean the arrangement, and any change in the original arrangement with Noble as of November 1, 1934, that may have taken place early in 1935 and the reason for that.

By Mr. Boyle:

Q. Will you answer that?

A. When Mr. Noble first approached us down there, when he entered in the trucking business under this contract arrangement we made with him, his first few loads, as *I recall were loads to Chicago, probably some of it for Milwaukee*, Wisconsin, and were carried on until, I believe, the first part of January.

By Mr. Fiddes:

Q. What year, please?

A. 1935. We gave him some shipments to what we call break bulk points at various stops in the State of Wisconsin, probably one or two in the northwestern part of Illinois, in the month of February, 1935.

By Mr. Boyle:

Q. Now, before you leave that, let us have your description of what you mean by a break bulk point, and how the point acquired that particular description in the traffic vernacular?

[fol. 399] A. It is a point usually located in a center of one or two or more particular salesmen. We consolidated all these so-called retail shipments into one carload and billed them to a drayman or a carrier down there, a truck carrier who unloaded the shipment and distributed it to the town proper and the surrounding territory.

Q. Prior to the time that transporting by truck was adopted, was it customary to send those shipments by rail in what is known as the peddler cars?

A. In that territory east of South St. Paul peddler cars were discontinued some years ago.

Q. The peddler car was a car that opened at a break bulk point and then went into local all the way along the line to peddle it?

A. Until empty.

Q. Then you continued the method of shipping to this so-called break bulk point by motor truck?

A. Yes.

Q. That is the business that you began turning over to Noble in January, 1935?

A. Yes, sir.

Q. Now, take it up from there. You have gotten to February, 1935. What, if anything happened then that made any change in that situation, and what was it?

A. February, 1935, I believe the first conference was held at our office here at South St. Paul where three of our rep- [fol. 109] resentatives from Chicago were up, wherein Mr. Noble was called in, and we discussed the possibility of having Noble make direct store-door deliveries, not alone to the break bulk point, but also to points surrounding the break bulk point.

Q. Which points we have referred to and may refer to as the old car route points?

A. The old car route points.

Q. What was the result of that conference? What happened there?

A. Well, there was correspondence. There were one or two other conferences held amongst the people interested in the move here at South St. Paul, and it was finally decided if Mr. Noble was willing to put on additional and special equipment for the handling of these products to allow him to make these store door deliveries direct. I don't believe that was accomplished until in October of 1935.

Q. You mean the actual beginning of the actual movements?

A. Yes, sir.

Q. Well, the first conference in February, 1935 that you say Mr. Noble was called into; was that conference at his solicitation or Swift's?

A. No, we called him in.

Q. It was on Swift's proposal?

A. Yes, sir.

Q. Will you be a little bit more full in your statement with respect to these special or better equipped trucks? Just what have you in mind? What was the idea?

[fol. 401] A. It has always been our policy, the policy of our operating department as well as our sales department that our products must be delivered in the best possible shape, and they feel in order for this to be accomplished they would have to have a specially equipped truck insulated according to our specifications and equipped with beef rails and racks. These beef rails, of course, are absolutely necessary for the transportation of our product, particularly on carcassed goods which have to be hung.

Q. Did Noble express willingness to acquire such type of truck?

A. Not alone did he express that willingness, but he did it, as well as, I believe, rebuilding two of the trucks he originally put in the service.

Q. To conform to the Swift specifications?

A. Yes, sir.

Q. That was prior to July 1, 1935, was it?

A. Yes, sir.

Q. Now, you say that the actual distribution by Noble to points beyond the break bulk or local car route points did not begin until after October 15, 1935, some time in October, 1935. Why didn't they begin earlier?

A. Well, there were quite a few difficulties encountered. We had these local draymen or carriers in these various towns. We felt we wanted to give them an opportunity to make other arrangements, or really get rid of their equipment. Generally they were under contract with us and the contract carried a clause to the effect that at least fifteen days notice would have to be given. It took quite some time [fol. 402] to make this arrangement.

Q. Is it correct to say that a change in your method of distribution of that character in an organization the size of Swift & Company cannot be, by any means, accomplished over night?

A. No.

Q. It would take approximately that time to work out the details?

A. Yes, sir.

Q. Is it correct to state that the distribution at these local points began as soon after these contracts, as the exigencies of the accomplishment of these details relating to the change, would permit?

A. Yes, sir.

Q. Now, then, after the middle of October, 1935, and in the middle part of October, '35, Noble began these deliveries at the local car route points?

A. Yes, sir.

Q. You spoke of the local draymen. As I understood you prior to that time any point that Noble was serving—break bulk point—he would deliver the entire truckload there from which point various local carriers, draymen, or whatnot would take it and bring it to the local points on the route?

A. That is correct.

Q. That involved necessarily these two handlings, did it not?

A. Well, it brought about an occasional transfer at the break bulk point, yes.

Q. Is it a slower process so far as the time in transport-[fol. 403] ing the product from Swift's plant to the customer?

Mr. Fiddes: Just a minute. I object on the ground it is immaterial. I do not know what that has to do with the operation.

Examiner Peterson: Objection overruled.

By Mr. Boyle:

Q. Was there a difference in the time element?

A. Yes.

Q. I merely want to show the reason for Swift & Company giving it. When Noble began this operation making a straight delivery to the points, to the local points on the route, about what saving in time would that make?

Mr. Fiddes: The same objection.

Examiner Peterson: Objection overruled.

The Witness: Prior to the time when we made dump load deliveries to the break bulk point they moved by car and with a few exceptions the car usually arrived there late in the evening or afternoon of the first day or early the second morning. It was also true in a good many instances where a truckload delivered to a local so-called drayman at a

break bulk point, he was never ready or was not willing to take those shipments until a certain hour in the morning. Then it caused additional time to be lost by this transfer. Each one of these draymen in these smaller towns were not capable of handling these products. Their equipment was not suitable for it, usually was not insulated.

By Mr. Boyle:

Q. Was there an appreciable saving in time in this direct [fol. 404] handling from the Swift plant to the local way points on these routes by direct shipment via Noble over the time that had elapsed either by rail shipment to the break bulk point and local carrier drayman distributing from there?

Mr. Van Osdel: Just a minute, that is objected to on the ground that it has no particular bearing on the question of the applicant's grandfather rights of July 1, 1935. It is clearly a question that is obviously put in in the matter of public convenience and necessity.

Mr. Boyle: Mr. Examiner, we have got railroad protestants here. I thought it was material to show, to try to show the superiority of this method of delivery to the old railroad peddler car.

Examiner Peterson: That is somewhat pertinent. I think it is permissible. Go ahead.

Mr. Boyle: Various questions that have been asked here on cross examination might lead to the inference and it probably will be contended by the advocates of that position that Noble has broken into somebody's territory or gotten somebody's business. I want to show here that this was at Swift & Company's own solicitation and entirely by their own volition, and I want to get the reasons here in order to make it a part of the picture.

Mr. Fiddes: Would the Examiner feel that the protestants should be entitled in the grandfather case to put on twenty five or thirty witnesses?

Examiner Peterson: No. The first part of the testimony [fol. 405] to show the superiority over the railroad service, —I don't think that has anything to do with it, to show superiority. Your previous question did not indicate that.

Mr. Boyle: I don't care about going into the rail situation except that there have been questions along that line.

Examiner Peterson: As a matter of fact the protestants

brought in these small operators. That question was brought up on cross examination, I think, as to who handled the business before.

Mr. Boyle: It was indeed, leaving the inference that Noble had gone in and taken business away from somebody else.

Mr. Van Osdel: Mr. Examiner, the reason that was gone into was merely to ascertain who was carrying the freight as of the definite grandfather date of July 1st. I am going to make it perfectly clear that there is going to be some Swift witnesses a lot of testimony concerning the superiority of the applicant's service, why they have to have it, I am going to sit here and object all night, because this is purely a grandfather hearing and all this Swift witness can testify is to throw light on what Mr. Noble was doing as of July 1, 1935.

Examiner Peterson: I think we have got enough of that. This is preliminary stuff right now.

Mr. Boyle: I would like to make one comment on counsel's statement there. It makes no difference for what purpose any of his cross examination was intended. The fact remains that certain questions were asked from which in- [fol. 406] ferences may be drawn from a cold record by others than counsel, or may leave the imputation that Noble's handling of these car route local points was the accomplishment, if you please, of Noble's efforts to take business away from somebody else.

Examiner Peterson: As I stated a while ago, I think it is pertinent. I think the witness ought to proceed, except to show that it is superior over railroad service or superior over any particular service, and that was his main reason for doing something which the protestant objected to. Protestants object to showing that any other service was superior to theirs. It may be some of these protestants did operate in that territory.

Mr. Fiddes: Furthermore, the objection is very pertinent because it appears this operation was commenced in October, 1935, the actual operation.

Mr. Boyle: That is the distinct point, Mr. Examiner, connecting up the original proposition of Swift & Company, which we have established.

Examiner Peterson: In February, 1935.

Mr. Boyle: In February, 1935, the rest of the time it took to work out the details.

Examiner Peterson: That is the reason I am letting it go in.

Mr. Boyle: The Commission, in its decision of motor cases has repeatedly held such testimony to be pertinent.

Examiner Peterson: There is no question about that.

[fol. 407] Mr. Boyle: Yes.

Mr. Edell: Counsel has stated here an attempt was made by the cross-examination to prove that Noble had taken business away from some other carrier. It was purely for the purpose of finding out what were the operations during the grandfather period, prior to July 1, 1935.

Examiner Peterson: Yes.

Mr. Edell: That was the sole reason for bringing out the method of distribution beyond the break bulk point set up in the record by which it was handled during the grandfather period.

Mr. Fiddes: I wonder if the question could be read for a ruling on it, unless you recall the question sufficiently to rule on it.

Mr. Boyle: Let us not go back to that. I will ask the witness this:

By Mr. Boyle:

A. In the handling of Swift & Company products to these local points has it been the experience and is it your opinion that a direct move by handling from the packing plant without any interchange with any one direct to the consumer at the local point is more satisfactory both as to expediting the movement and as to properly carrying the commodity and carrying it in better condition?

Mr. Fiddes: The same objection. It is immaterial whether it is more satisfactory or not.

Mr. VanOsdel: Objected to as immaterial in this case.

Examiner Peterson: Objection overruled.

[fol. 408] (Last question read.)

The Witness: From our experience we have found that a direct delivery to the customer is the best service.

By Mr. Boyle:

Q. In the regular course of your business, have you had occasion to contact the customers on these routes who have so expressed themselves?

Mr. VanOsdel: Objected to as immaterial to the issues in this case.

Examiner Peterson: Of course, you have gone far enough in connection with this, but even assuming now that such a service is superior, that does not authorise the applicant to start any operation after October 15, 1937 unless he has the territory.

Mr. Fiddes: '35, I think you mean.

Examiner Peterson: After October 15, 1935, unless he has the territory. Well, naturally, it is better to have a change of service as applicant stated.

Mr. Edell: This question calls for a conclusion of the witness.

Examiner Peterson: It will give an index why he started something after October 15, 1935. The question remains as to whether that was done lawfully. There is a reason for it, for doing it.

Mr. Fiddes: No badly how it is needed, if he did it unlawfully, if he started out after October, 1935, no matter why he started it. I assume the reason why Mr. Noble started [fol. 409] it was to make a living.

Examiner Peterson: I little history of it is pertinent. I think we have had enough of it.

Mr. Boyle: I make that as an offer of proof and would show by this witness were he permitted to answer that——

Examiner Peterson: I have not denied it. What is it, what more do you want to put in. What do you want to show?

Mr. Boyle: I just want an answer to that question. That is all. I am not going to pursue it any further.

Mr. Fiddes: The question itself is the best offer of the proof and the answer.

Mr. Boyle: No. I am going to give you what his answer would be if he were permitted to answer.

Examiner Peterson: I have not overruled you.

Mr. Boyle: Did he answer the last question?

The Witness: Yes.

Mr. Boyle: Will you read it? I will not pursue it any further.

Examiner Peterson: I think we had enough on this particular subject.

Mr. Boyle: After that question I will desist from that examination, if we might have an answer to that one.

Mr. Fiddes: He can answer that one.

(Last question read.)

The Witness: Yes.

Mr. Fiddes: Hold on just a minute, that answers the [fol. 410] question.

By Mr. Boyle:

Q. You may qualify the answer or explain it any way you wish. You are not limited to a yes or no answer.

Mr. Fiddes: The same objection. Any qualification will be subject to the objection.

Examiner Peterson: Mr. Boyle, are you going to rely on this policy of convenience and necessity?

Mr. Boyle: No, Mr. Examiner, I am just trying to paint the whole picture. In order to go over this case, I am going to take it up that way and try, as near as I can, to consider chronologically the picture of the entire development, just to show how it all happened right straight along.

Examiner Peterson: I think that is all right.

By Mr. Boyle:

Q. Did you intend to qualify or explain that answer that you gave?

A. Yes—through direct contact on inspection trips we make quite frequently over these routes whereby we call on the customers and get their opinion as to whether they were satisfied or dissatisfied with the service they were getting on our shipments.

Mr. Fiddes: I move that the answer be stricken for the reasons expressed in the objection.

Examiner Peterson: The answer may remain.

By Mr. Boyle:

Q. Now, it appears from the testimony that subsequent to 1935, in fact some operations not beginning until maybe the latter part of '37, you employed the Noble Company [fol. 411] on other car routes in addition to those that he operated on in the latter part of '35 and the early part of '36?

A. Yes.

Q. That already appears.

A. Yes.

Q. Following the testimony that you have given and as a part of this picture, what have you to say as to what led to that, that is, this employment of Noble on additional and other hauls?

A. We found his service when we first started using store-door delivery was good and we felt that to maintain some of the business and to meet some of the competition we were encountering from some of the competitors that we should make that same delivery and extend the service wherever possible.

Q. Was it a more economical operation to deal with a man with whom you were already dealing on the routes that he was serving in 1935 and early '36, rather than have a multitude of people to deal with?

Mr. Fiddes: You are going too far, Mr. Boyle.

Examiner Peterson: What is the purpose of this, Mr. Boyle?

Mr. Boyle: The record shows that Noble took on additional car routes than those he was handling in '35 and early '36.

Examiner Peterson: On the assumption that he had the territory.

Mr. Mattimore: I take it the witness said he didn't have that territory, never serviced it prior to August '37.

Examiner Peterson: I think, I guess we ought to see [fol. 412] whether he looked into the rights of the applicant.

Mr. Boyle: Probably the rights of the applicant would be a legal question. The only point I wanted to make was why Swift & Company employed Noble on different routes.

Mr. Fiddes: I wonder if Mr. Boyle will state to us his theory how the reason that Swift & Company employed Mr. Noble, referring to grandfather rights, in any manner affects what grandfather rights he has now.

Mr. Boyle: It seems to me that my theory of this case is not understood. I thought it was. I am not at all wedded to this grandfather right proposition. I understand exactly what the statute says. I understand also what the statute means about any operations after July 1, 1935. Within a limited period filing of applications thereunder would likewise, if I understand what the statute means, be new operations. I am by no means waiving and in fact I may stress or intend to stress with all my ability any and all rights

that the applicant may have under the so-called grandfather clause; but, in the event the Commission should be of the opinion that operations of the Noble Transit Lines, after July 1, 1935, or to be more specific, his operations in 1936 to points he was not serving on July 1, 1935, were not covered under the grandfather clause, then the Commission must in this proceeding on the pending application consider whether or not Noble is entitled to continue those operations. I don't care whether you call them new operations or what not.

[fol. 413] Mr. Fiddes: Do you refer to the ones commenced in 1937?

Mr. Boyle: I am referring to this thing commenced after July 1, 1935.

Mr. Fiddes: Including those started in 1937.

Examiner Peterson: Any operations that he started after July 1, 1935, up to October 15th, 1937, he no doubt could continue until the Commission told him to stop; but any operation that was started after October 15, 1937, if he does not have a territory it is illegal. You cannot prove any rights of convenience and necessity in this proceeding.

Mr. Boyle: With all due respect to you, I disagree with the Examiner's limited interpretation of that portion of the statute. I find nothing in there at all.

Examiner Peterson: The Commission will give you a further hearing in connection with the new operation.

Mr. Boyle: The Commission, I contend will consider it in this proceeding.

Examiner Peterson: No, the parties have not had the rights and my rulings even said they have been deprived of having notice. They haven't had notice.

Mr. Boyle: I fully understand your rulings.

Examiner Peterson: The applicant did not inform the protestants anyway, or the Commission that they proposed to ask for rights as convenience and necessity in this proceeding.

Mr. Fiddes: Furthermore, I point out that the applicant [fol. 414] expressly stated, as I recall it,—and understood him to state these did not occur. I differ in the nature of the operations between July 1, and October 18th. What it was on July 1st it was on October 15th. Differences that are being discussed did occur after the effective date of the act. They ought not to have occurred legally and certainly we ought not now to be confronted with evidence that it was

necessary for those illegal operations to be commenced. I think it is wholly beyond the record. Furthermore, if extended a record of this kind is going to have page after page of discussion of this type.

Mr. VanOsdel: We make the further point that even between July 1st, 1935 and October 15, 1935, there could be no continuous operation until such time as there had been a so-called BMC-8 application which we would receive copies to show public convenience and necessity could be shown.

Mr. Boyle: It appears, Mr. Examiner, I am decidedly in the minority, in my interpretation of the law. If I am wrong in my interpretation, why it is just too bad for me and my client.

Examiner Peterson: I am going to rule against you on any further evidence in respect to convenience and necessity being allowed at this hearing. Then you can appeal my ruling; but the Commission could never decide properly and fairly the convenience and necessity case upon a hearing like this with the protestants.

Mr. Boyle: I don't like the term of convenience and neces- [fol. 415] sity. I do not know that that word is used in the statute. I believe it says something about consistency of public interest.

Exam. Peterson: All right.

Mr. Boyle: The ruling is the same.

Exam. Peterson: This contract carrier operation, it will be consistent with public interest, the Commission cannot determine it in a case like this.

Mr. Van Osdel: Examiner Peterson, it is my understanding your ruling is there will be no introduction relative to public convenience and necessity relative to those operations after October 15th, 1935?

Exam. Peterson: Or, that it is in the public interest.

Mr. Van Osdel: Well, it goes to public interest, relative to testimony, the point I was making that applicants are attempting to put in testimony on public convenience and necessity and public interest on those operations after October 15, 1935. It is to that that you are ruling against the introduction of testimony?

Exam. Peterson: Yes.

Mr. Boyle: May we take this then; the ruling has been made excluding any such testimony?

Exam. Peterson: That is right.

Mr. Boyle: May the record show that counsel for the applicant respectfully excepts from that ruling?

Exam. Peterson: Your exception will be noted.

[fol. 416] By Mr. Boyle:

Q. Mr. Metzger, if the Commission should decide that Noble Transit Lines is not entitled to continue any of its operations to points at which it was not making specific deliveries prior to either July 1, 1935, or October 15, 1935, what, if any arrangement would you make to take care of that territory?

Mr. Fiddes: I object to the question as immaterial. It is wholly besides the point. The question here was, what was he doing on July 1st. If he wants to agree he can prove something on convenience and necessity.

Mr. Boyle: Again, Mr. Examiner, there has been an imputation that Noble was taking business away from somebody else. I want to develop from this witness whether or not if Noble were not in business if another trucking company would get that business.

Exam. Peterson: Yes.

Mr. Boyle: As preliminary, I want to know if this witness does know if in the files of the headquarters of Swift & Company in Chicago, there has not been stated to this witness with respect to what Swift & Company would do in that eventuality.

Exam. Peterson: That has nothing to do with grandfather rights. That can be determined later on in a convenience and necessity, in another proceeding for rights. If he can show that it would be consistent with public interest on the policy declared in Section 202, that is agreeable with them.

Mr. Boyle: Is the objection to the question sustained?

[fol. 417] Examiner Peterson: Yes.

Mr. Boyle: Exception respectfully noted.

By Mr. Boyle:

A. Mr. Metzger, if the Noble Transit Company be not granted authority to continue with these various points, would Swift & Company put on its own trucks and operate in the territory?

Mr. Fiddes: The same objection.
Examiner Peterson: Sustained.
Mr. Boyle: The same exception, if you please.

By Mr. Boyle:

Q. Mr. Metzger, have you seen the list of Swift commodities as shown in the exhibits that have been filed here by the applicant?

A. Yes.

Q. The first sheet of exhibit 5 was a list of commodities, headed "List of commodities shipped at or received by Swift & Company". Are the items on that list familiar to you?

A. Yes, sir.

Q. Are the items that Swift & Company in the regular course of business shipped or received?

A. Yes, sir.

Q. Now, I realize without a detailed examination of each shipment you would be unable to testify as to just what was in a particular lot, but direct examination here has already developed quite a varied assortment of commodities. I will ask you, Mr. Metzger, if in the course of Swift & Company's shipping any one or more or a combination of these com-[fol. 418] modities might be included in the shipment?

A. Yes.

Q. There are no unusual items on there that might not find their way into most any of these shipments?

A. With this exception, I believe now that at the present time there is salad dressing and one other item that we discontinued manufacturing that we do not have.

Q. Do you receive it manufactured from anybody else?

A. At our plant there — occasionally do.

By Examiner Peterson:

Q. What commodity is that?

A. That is a sandwich spread, a salad dressing.

By Mr. Boyle:

Q. In the business of transporting the commodities of Swift & Company, using special reference to contract truck transportation, is it necessary for Swift & Company to have

an arrangement of considerable latitude whereby it may ship to any of the points in a sales territory?

A. Yes, sir.

Q. And has Swift & Company found Mr. Noble's Company able, ready and willing to do such transportation?

Mr. Fiddes: Objection on the ground that it is not within the issues of this case.

Examiner Peterson: Objection sustained.

Mr. Boyle: Exception. Now, Mr. Examiner, I would like to make an offer of proof and I do make such offer that if this witness were permitted to testify along the lines of my examination to which objection has been made and sus- [fol. 419] tained, and exception taken, he would testify——

Mr. Van Osdel: May I interrupt you, Mr. Boyle, please?

Mr. Boyle: Yes.

Mr. Van Osdel: Would it be possible at this time to have a few minutes recess?

Examiner Peterson: For what?

Mr. Van Osdel: I would like to talk over a particular matter relative to the offer of proof right now with counsel for protestants.

Examiner Peterson: He has got a right to make an offer.

Mr. Van Osdel: I would like to have a few minutes.

Examiner Peterson: With him?

Mr. Van Osdel: No, with counsel for protestants.

Mr. Fiddes: This has something to do with our attitude in this case. It will only take a few minutes.

(A short recess had.)

Examiner Peterson: Mr. Boyle, you started to make proof.

Mr. Boyle: Before the short recess I started to make an offer of proof which I will now conclude. This witness, if permitted to testify along the lines that I have indicated, to which objection has been made and sustained and excepted to, would testify that the operation of the Noble Transit Lines from its inception was very satisfactory; that the customers expressed their approval of the more expeditious service, likewise the better condition of the commodities transported; that the dealings with the Noble Transit Com- [fol. 420] pany continued satisfactory and he showed sufficient ability and efficient handling of the commodities so that they tendered to him without his solicitation after July

1, 1935, after October 15, 1935, and into 1937, more car routes; that it was more satisfactory and considered more efficient by Swift & Company to have as many as possible of these car route operations in this particular territory confined to a single operator, or as nearly that as possible; that it is important to Swift & Company that the utmost flexibility be permitted in this distribution of their product with special reference to their car routes; that the operation through the Noble Transit Company permits them to make shipments to car route points in Wisconsin, let us say, and to include therein sometimes when the car route is not full or the truckload is not full, a consignment for Chicago, and that the Noble Line can continue after peddling the truck route into Chicago and unload the particular lot, the particular truck shipment, and receive a load from Swift & Company and return home in time to make a reasonable fixed schedule of their deliveries. He further would testify that under this arrangement it is possible for Swift & Company to accept and they do accept orders up until late in the evening and into the night which can be gotten out that night and delivered to the customer at the local point the next morning without any transfer or without any further handling. He would further testify, if permitted that Swift & Company has not found any other trucking operation as satisfactory in this territory that Noble serves, and [fol. 421] their experience has been such that if the Commission should deny Noble & Company the necessary permit to operate in the territory Swift & Company would put on their own trucks and operate them themselves. I believe that concludes my offer of proof.

Mr. Mattimore: Is it your statement, Mr. Boyle, that this witness could develop that last statement you made?

Mr. Boyle: Yes, sir. That this witness is in contact with his superiors, not only here, but also in Chicago, which is the source of his instructions and has had expressed to him the attitude, opinion and intention of the executives who had the dictation of that policy in their power and who exercise that power and that is the source of his information and that is what he has been told. That I make as an offer of proof.

Examiner Peterson: Mr. Boyle, some of the things you mention in your offer of proof, I think are all right for the witness to testify to in connection with grandfather rights,

but not in so far as superior service of Noble to others and things like that; but you mentioned several things about what he would actually testify, as to what he would do, he is doing it right now; so I understand you can bring it out what he is actually doing.

Mr. Fiddes: Who is "he"?

Examiner Peterson: The applicant.

Mr. Fiddes: That is very pertinent.

Examiner Peterson: Your offer of proof there included something I did not really question.

[fol. 422] Mr. Boyle: One of the things I mentioned there was that he would give his reasons for expanding, if you please, the Noble operations for Swift & Company since the so-called grandfather period. I asked the witness that question and there was objection. It was sustained as not being material.

Examiner Peterson: About his operation, what he was actually doing and the points he was serving, how the service was performed at the break point,—he has not testified with respect to that, but I would admit that.

Mr. Boyle: Why, he has testified to——

Examiner Peterson: To all the points?

Mr. Boyle: To the fact that Noble brought it in there.

Examiner Peterson: Yes.

Mr. Boyle: That formerly it was handled by local truckers, if you please.

Examiner Peterson: Yes.

Mr. Boyle: That Noble did not handle any local points until about October 17, 1935.

Examiner Peterson: Yes.

Mr. Boyle: Which I understand is out, not considered by the Examiner or by my friends of the opposition as within the grandfather clause.

Examiner Peterson: But he can testify to the points that Noble served after October 17, 1935, just to give the Commission a clear picture as to his entire operation and not the necessity for it, or that he is better than somebody else.

[fol. 423] That has nothing to do with the grandfather rights; but you propose to show that if he hadn't any grandfather rights he should be permitted, after the Commission considers this record, that he should have it on this record, but I have ruled against it.

Mr. Boyle: I understand you do not agree with my contention.

Examiner Peterson: That is right. I am not ruling against the witness testifying with respect to any of the operations being actually performed after October 17, 1935, or the points he served. I think the Commission would like to have a picture of it.

Mr. Boyle: I would think, however, it has been established here already by direct testimony and very extensive cross examination what points Noble took on after October 15, 1935, and now, in '36, and '37.

Examiner Peterson: Yes.

Mr. Boyle: As far as Swift & Company is concerned the witness would merely corroborate that. I do not know as there is any particular point in that. There has been no particular dispute about that.

Examiner Peterson: I thought you wanted this witness to testify with respect to points he actually did serve.

Mr. Boyle: I want to paint the picture as to why Swift extended Noble's operations and the reasons prompting it and what the necessity for it was in Swift & Company's opinion.

[fol. 424] Exam. Peterson: I thought when you put on this witness he was to testify with respect to the actual operations. He knew that shipments went to these various points, not only before October 15th, but after October 15th; that this witness in addition to the documentary evidence, which some of it is not correct,—but this witness is going to testify in addition to Mr. Noble.

Mr. Boyle: I would merely ask him, in order to shorten the time, if he had been present yesterday and today and had seen and examined the exhibits filed by Noble showing the shipments, and if, to the best of his information and belief those shown as having been made for or by Swift & Company actually had been made.

Exam. Peterson: Yes. Well, other witnesses that you may have, are they going to testify with respect to convenience and necessity?

Mr. Boyle: I do not like to call it that.

Mr. Fiddes: Are they going to testify with respect to the same questions?

Exam. Peterson: I thought they were going to testify with respect to the actual operations. That is the difficulty

in a lot of these grandfather cases as to know whether they actually operated over the route that they claim.

Mr. Boyle: I thought that that had been rather fully shown in the testimony of the previous witness and the exhibits supported by the documentary evidence and the [fol. 425] exhibits. I did not intend going over that again.

Examiner Peterson: Maybe it is enough. Then you are through, aren't you, since you are not going to be permitted to introduce witnesses in respect to the public convenience and necessity.

Mr. Boyle: I thought I was through some time ago. I would like, with your permission, if you please, to just develop the record a little further.

Mr. Van Osdel: Mr. Boyle, I would be interested in ascertaining from these witnesses the several natures of the products, and things of that kind, things that were hauled. That is what I intend to examine about.

Examiner Peterson: That is what the Examiner thought was going to be produced.

Mr. Boyle: My offer of proof along those lines stands, but I will ask the witness now, taking up the examination along another line:

By Mr. Boyle:

Q. Were you present at all on the hearing yesterday?

A. Yes, sir.

Q. And today?

A. Yes, sir.

Q. And you have seen the exhibits that have been submitted by the applicant here purporting to show shipments made by for or to Swift & Company or its subsidiaries since May 17, May something and November, 1934, divided into periods which are not material for the purpose [fol. 426] of this question? You have seen such an exhibit?

A. Yes, sir.

Q. You have examined them?

A. Yes, sir.

Q. Are the shipments therein shown as so far developed for Swift & Compnay or its subsidiaries shipments that actually were made by Swift & Company to you for Swift & Company or its subsidiaries?

A. Yes.

Mr. Mattimore: That is objected to as calling for a conclusion, no foundation. There is no way that Mr. Metzger can possibly tell, looking at those exhibits, whether they conform to the bills that they have here.

Mr. Boyle: Mr. Metzger has seen the bills.

By Mr. Mattimore:

Q. Did you compare that, Mr. Metzger, with the exhibit?

A. No.

By Mr. Fiddes:

Q. Did you read each item in each of the exhibits, Mr. Metzger?

A. No, I did not, each and everyone of them, no.

Exam. Peterson: As I recall the witness Noble testified he did not know what some of the shipments consisted of; that the witness of Swift & Company would know.

Mr. Boyle: That goes to the question of the commodity.

Mr. Fiddes: I also pointed out, if the question were asked, Exhibits 8 and 9 do not indicate any shippers or con- [fol. 427] signees, so it would not be possible to look at them and tell whether they were Swift shipments. I take it this gentleman would not know by looking at the exhibits 7, 8 and 9, that all of those things, or any of them are hauled by Swift & Company.

Mr. Boyle: Their car route on there is hauled for Swift.

Mr. Fiddes: Are there shipments on there hauled for other people?

Mr. Boyle: Yes.

Mr. Fiddes: Could he tell by looking at the exhibit which was which?

Mr. Boyle: I don't know.

Mr. Fiddes: It is quite apparent he couldn't.

Mr. Boyle: I will not pursue it any further. If you want to get to this question you may have the witness.

Cross-examination.

By Mr. Van Osdel:

Q. Mr. Metzger, there has been some talk this evening about some new car routes, and so forth, and I believe it was confined to Wisconsin, was it not?

A. And part of Illinois.

Q. And part of Illinois?

A. Yes.

Q. Keeping in mind that I am, of course, interested in Minnesota and North Dakota, my questions will be directed towards that territory?

A. Yes.

Q. Mr. Noble testified that his operations, as of October [fol. 428] 15, 1935 were the same as they were as of July 1st, 1935. You do not know it to be any different than what he says, is that correct?

A. Yes, sir.

Q. So far as you are concerned as an employee of Swift & Company, in connection with the transportation problems of Swift & Company which would bring you in contact with Mr. Noble, that is your understanding of it, too?

A. Yes.

Q. Now, then, there are a couple of shipments that appear in what is known as exhibit 6. Could you confront yourself with them there?

A. Yes.

Q. You will find an item, on exhibit 6, page 1, the fourth shipment down, which is the seventh month, third day, 1935, Swift & Company, South St. Paul, Minnesota, to Detroit Lakes, Minnesota, and Sauk Center, Minnesota and Grand Forks, North Dakota. Now, then, I wonder if you will be so kind as to have Mr. Noble find for you, or if you are familiar with the original record, to get that shipment there?

A. These are Noble's records. I am not any too familiar with these. He will probably be able to find it. Yes, I have that shipment here.

Q. Now, Mr. Noble advised us that he could tell from that, that the shipment that went to Detroit Lakes was four cases of cartons. He can say that the shipment to [fol. 429] Sauk Center was twenty four bundles of box lumber. He said he thought some representative of Swift's could more ably tell what was the content of the shipment to Grand Forks, that is represented in that particular shipment. Could you be of any assistance to us in that regard?

A. This shipment to Grand Forks would consist generally of all the products that are listed on this bill of lading here, supplemented, probably, with some items that are not shown on this list here.

Q. Is there any way of knowing what those items, the different ones, I mean are?

A. Not to Grand Forks, no.

Q. Now, keeping in mind that this shipment was made on July 3rd, 1935, from your experience with the company, is there any incident that you might call upon from your memory as to just what you would be shipping into Grand Forks as of that time?

A. Well, it would be fresh meats, probably some dairy products, cured meats, and what we call contraband items like canned goods and articles of that nature.

Q. That was prior, of course, to the time that Mr. Noble was going in with a great deal of regularity to Grand Forks, was it not, according to his own records?

A. I believe this, from his record, is the first shipment that he made prior to October 15, into Grand Forks.

Q. Yes. Did he tell you there is one other shipment that he made that is to be found in exhibit 5 prior to July [fol. 430] 1st? That is the only shipment after July 1st up to October 15th, but it is one of the early shipments, is it not?

A. Yes, sir.

Q. Would it be fair to say it consisted primarily of meat, both smoked and cured in cans and so forth?

A. And fresh, yes, sir.

Q. And fresh, also?

A. Yes, sir.

Mr. Boyle: Dairy.

By Mr. Van Osdel:

Q. Oh, yes and dairy products?

A. Yes.

Q. Now, then, there is a similar shipment, as stated, before July 1st, 1935 and that you would find in Exhibit number 5.

Mr. Boyle: You got the date of that handy?

Mr. Van Osdel: Yes. It is June 22nd, 1935.

The Witness: That was in to Grand Forks?

By Mr. Van Osdel:

Q. Yes.

A. Yes, I have it here.

Q. I call it item number 20-B. It is on page 7 of exhibit 5. June 22nd, 1935. It is from South St. Paul, Minnesota to

Grand Forks, North Dakota and Detroit Lakes, Minnesota. In that instance we also ascertained pretty much what the Detroit Lakes content was, but we are unable to ascertain very much what the Grand Forks content was. I call your attention to the fact that is the same sort of billing as this [fol. 431] item we just gave the name of item 23 and exhibit 6. Is that correct?

A. Yes.

Q. It was sent to the same man, Bill Whalen Transfer and receipted the same?

A. I did not look at the receipt on the other one. I assume they are the same.

Q. It looks like approximately the same kind of a shipment. Now, would it be reasonable to believe, in order to assist the record, that also was a shipment in the early days of Mr. Noble's transportation into Grand Forks and it mostly consisted of meats, both fresh and smoked and so forth.

A. Yes, including, of course, the other items that I have mentioned before.

Q. Dairy products?

A. Yes.

Q. Just so that I get it clear, and not one left out or anything, it was meats, both fresh and smoked and dairy products?

A. Yes, sir. We term them contraband items.

Q. Contraband items?

A. Yes.

Q. Is there any way of telling us what they are?

A. Well, they consist of canned goods.

Q. They consist of canned goods?

A. Yes, and probably other articles that usually go along with the Packing House industry that are not shown in this [fol. 432] bill of lading.

Mr. Boyle: Can you give him any better idea?

By Mr. Van Osdel:

Q. The point I am making is this: it is a fact, isn't it, later on when Mr. Noble got to transporting into Grand Forks with regularity, then there was a greater variety of commodities, but in these early trucks that were made up

there, they mostly consisted of fresh meats, smoked meats and dairy products, maybe one or two other items.

A. Yes, that is true.

Mr. Van Osdel: That is all I have, Mr. Fiddes.

By Mr. Boyle:

Q. That contraband; would that include soap, gelatine?

A. Soaps, gelatines.

Q. Glue?

A. Glue, yes.

Q. Lard?

A. Lard is a packinghouse product.

Q. Lard substitutes?

A. Yes.

By Mr. Van Osdel:

Q. Mr. Metzger, there is a list given, and what is that termed; exhibit 5, of a great deal of commodities. What do you call those? Is that packinghouse products, or what?

A. No, that is not entirely packinghouse products, although they are included in this list here.

Q. Now, the fact that I was trying to get at was are these [fol. 433] two original trips to Grand Forks. In fairness to the record, does that consist of all the general items that appear in that exhibit?

A. No.

Q. In the fly leaf of exhibit 5, it is a fact they did not, isn't it?

A. It is a fact they did not include all of the items shown in this list.

Q. Is there any distinction between that of packing house products and those other products that you deal in? Do you have any different terminology for them?

A. No, not exactly.

Mr. Boyle: Wait, are we speaking in the parlance of the packing house or of freight classification? I just want to get that clear.

Mr. Van Osdel: Well, I say——

Mr. Boyle: There is quite a distinction when you get to the rates, for instance.

Mr. Van Osdel: We have before run into this matter of items in packing house parlance. We are interested in

knowing what definitions there are. I think I would be interested in that.

Mr. Boyle: I have given, for instance, fresh meat, packing house products. The packing house is a considerable list. How long is the packing house list in the classification, railroad classification?

[fol. 434] The Witness: Oh, two and a half or three pages.

By Mr. Boyle:

Q. Then, your dairy products. That is not a packing house product?

A. Absolutely not.

Q. Differently classified, a different rating?

A. Yes, sir.

Q. As dairy products you would have items, not taking the same rate; they just would not take the same rates as poultry?

A. That is true.

Q. So you can't say that the item packing house products would sufficiently describe?

A. Oh, no, it does not describe all of our commodities, no.

By Mr. Van Osdel:

Q. Then, this first page of exhibit 5, does it include all the commodities that are to be transported?

A. Well, I would have to check them very carefully. To me it appears to be a list of commodities that would be transported for us, Swift & Company.

Q. Now, then, just one question more. These two shipments I have asked you about, concerning Grand Forks are made on what we might term a bill of lading that has an extra amount or list of commodities on it, is it not?

A. Yes, sir.

Q. And, isn't it a fact that in all probability the contents of that shipment did not exceed the items that are listed on it?

[fol. 435] A. Exceed this list?

Q. Yes.

A. I would not be able to check or make a statement to that effect without knowing what all of the shipments are shown, as the total weight consisted of.

Q. What was the purpose from your company's standpoint to use a bill containing fifteen, twenty or thirty articles listed on it, if you know?

A. We do that for economy purposes, because generally these shipments into Grand Forks were turned in to Bill Whalen Transfer, so we furnished, in addition to this billing, either rail billing or truck billing which would be tendered over to both of the carriers at Grand Forks for further moving.

Q. Would that have the exact items on?

A. Yes.

Q. Is that available to us here?

A. No, we have not our records for 1935 any more.

Q. You can appreciate that in these cases, relative to where carriers are hauling for companies of your kind that have all these items, we are only anxious to ascertain what the true items are. That is why I ask those questions. If there is anything else that you can add to what you have said relative to those items, we would like to know it, at least, I would.

A. Well, I could tell you this, Mr. Van Osdel, these shipments to Grand Forks consist of principally fresh meat, [fol. 426] packing house products and dairy products and our so-called contraband items. They would not include all of these items that are shown in this list on this exhibit.

Q. You mean all the items that are here in the list in front of exhibit 5?

A. That is true.

Mr. Van Osdel: That is all.

By Mr. Boyle:

Q. Swift & Company does purchase supplies or rather articles from other manufacturers that ship them either into this plant or to some other plant which may not be included in there, is that true?

A. Yes.

By Mr. Van Osdel:

Q. So then in substance, the two shipments I have been interrogating about contain merchandise and articles which are not as many or as numerous as appear on the fly leaf of exhibit 5, but at the same time you contend there are also

other items that do not appear on the fly leaf in exhibit 5 that your company does have the need for transporting?

A. They would not move to a point such as Grand Forks.

Q. That is the point I am getting at.

A. No.

Mr. Van Osdel: That is all.

By Mr. Fiddes:

Q. I think you have before you there the little book which is marked exhibit 4, that is, you will notice entitled "Partial list of commodities transported"?

[fol. 437] A. Yes.

Q. Between November, 1934 and various dates thereafter mentioned in the exhibit for Swift & Company. I would like to ask you if you were questioned about those commodities. I said various dates. I beg your pardon, I am corrected. These may not be for Swift & Company.

Mr. Boyle.

By Mr. Fiddes:

Q. We will turn to the front of exhibit 5, instead of 4. That does appear to be a list of commodities shipped and/or received by Swift & Company?

A. Yes.

Q. Among those items you will find the sixth one down automobile parts?

A. Yes.

Q. I take it Swift & Company does not manufacture or sell automobile parts, does it?

A. To my knowledge we do not manufacture, but we do purchase them.

Q. You do purchase them?

A. Yes.

Q. You do not manufacture or sell them to the trade?

A. No.

Q. If Mr. Noble had occasion to haul automobile parts for your company as he appears to have had, it would be because Swift & Company had bought some automobile parts and wished them delivered to Swift & Company by [fol. 438] Noble truck, would that be correct?

A. Yes, sir.

Mr. Boyle: Will you accept the supplement to that, "or transported from one of Swift's points to another Swift point for salesmen or branch house"?

Mr. Fiddes: That is true.

By Mr. Fiddes:

Q. Would that be correct?

A. In my belief.

Q. When Mr. Noble transports automobile parts for Swift & Company, into the State of Minnesota, he would transport them to some point at which there was located a Swift plant or branch?

A. Well, I would not be able to testify to that. I think that question was brought out in Mr. Noble's examination here, whether he did or not. I would not be in a position to state.

Q. Where else would it be likely that automobile parts would be received by Swift & Company except where it had a branch or a plant?

A. Salesmen out on the routes.

By Examiner Peterson:

Q. Salesmen out on the routes?

A. Yes, salesmen out on the route, our own salesmen.

By Mr. Fiddes:

Q. Do you mean that if you had a salesman out in International Falls, Noble would haul twenty pounds of automobile parts?

A. No, the understanding was that Mr. Noble would haul them out there. My statement to the effect that these automobile parts would be consigned to one of our own sales- [fol. 439] men on the car route, or in the territory, does not necessarily mean that these automobile parts were only moved to either one of our plants or a branch house.

Q. Take the next item, bags, all kinds. Is that also a supply that Swift & Company purchased for its use?

A. Yes, sir.

Q. Would those bags be shipped to any point except where there were branch houses of Swift & Company?

A. In the plants, in the branch houses and into the dairy and poultry plants. We designate our dairy and poultry plants separate from our branch houses.

Q. Bags would go to one of those plants or branch houses?

A. Yes, sir.

Q. The next item is barrels, kits, tubs, vats, also covers. Would that be also true of that type of supply?

A. Yes.

Q. Is belting a supply purchased by your company?

A. Yes.

Q. Would what you said be true of belting also?

A. Yes, sir.

Q. I wonder, Mr. Metzger, with this beginning, perhaps starting at the beginning of the list, we could go down here and mention in order those items in here which are of the type we have been discussing; namely, which come under the supplies purchased by Swift & Company, which would be delivered to a branch or plant?

[fol. 440]. Examiner Peterson: Probably it would be simpler to ask him what the shipments consisted of that went to points other than branch plants.

Mr. Fiddes: I can do that with exhaustiveness. I will be glad to ask the question.

By Mr. Fiddes:

Q. I gather, Mr. Metzger, that there are a number of articles on this page, on exhibit 5, of the kind that we have been talking about, about consisting of supplies purchased by Swift & Company, which would be delivered to a branch plant of Swift & Company?

A. Yes, sir.

Q. I don't know how many there are. There are also a number of items on here which Mr. Noble would transport for Swift & Company to places other than where Swift & Company would have a branch or plant in Minnesota. Do I make myself plain?

A. By including the dairy and poultry plants?

Q. Yes.

A. Yes.

Q. Now, I wonder if you could start at the top of that list and state which ones they would be. In the ordinary course of events we better take and recognize there can be an exception to anything?

A. Yes.

Q. In the ordinary course of things could you name the items on this list as of July 1st, 1935 which would be of

the character that would be transported in Noble's trans-
[fol. 441] portation to one of these points at which there was no Swift & Company plant or branch? In other words, I am thinking principally of Minnesota. I will ask you whether or not you had car routes served by Mr. Noble in Minnesota on July 1, 1935? I think you testified you did not?

A. We did not, outside of some of the shipments that were destined to Grand Forks, North Dakota, moved back into Minnesota, not served by Mr. Noble.

Q. I understand on July 1, 1935, Mr. Noble did not have any car routes there for Swift & Company, but that he was having car routes in Wisconsin. You bear in mind he had three trucks at that time?

A. It is possible we may have used him on some emergency runs nearby to a plant in South St. Paul.

Q. He had no regular car route to perform in Minnesota as he has in Wisconsin?

A. No, sir.

Q. Where in the ordinary course of things he would be carrying it on trucks to your customers?

A. No, sir.

Q. Having that in mind, do you also have in mind the question I asked you?

A. No, sir.

Mr. Fiddes: Could you read the question?

(Last question read.)

The Witness: Yes.

[fol. 442] By Mr. Fiddes:

Q. You have that before you?

A. Yes, I have that last.

Q. If you will go, not too quickly, I might ask a little as you go along.

A. Advertising matter, anti-freeze.

Q. Do I understand that anti-freeze is a product of Swift & Company?

A. I can't say for sure it still is. It was at one time.

Q. We are speaking as of the date of July 1, 1935?

A. I can't say as to that time on anti-freeze.

Q. You better testify as to the items that you know,

Examiner Peterson: Well, anti-freeze was produced for your company.

By Mr. Fiddes:

Q. Did you produce anti-freeze, too?

A. Oh, yes, we produced it and manufactured it at one time.

By Examiner Peterson:

Q. Do you still produce anti-freeze?

A. Yes.

Q. Did you on July 1, 1935?

A. I can't definitely say on that date whether it was manufactured or we were purchasing it.

Q. You are pretty sure it moved?

A. Yes.

By Mr. Boyle:

Q. It is a product with a glycerine base?

A. Yes.

Q. That is how you happen to be manufacturing it?

[fol. 443] A. Yes.

By Mr. Edell:

Q. If he did not make it that time he would not be moving it to customers. You would be purchasing it for your own use, or someone?

A. Not necessarily.

Q. You would be purchasing it for sale?

A. Some of it.

Exam. Peterson: Anti-freeze.

By Mr. Fiddes:

Q. Go ahead.

A. Bouillon cubes, right after boots or shoes.

By Exam. Peterson:

Q. Oh, yes.

Q. Butter, peanut butter; canned goods, cheese, chemicals, cleaning compounds, clothing.

Q. What kind of clothing; overalls, things like that?

A. Yes, smocks and frocks that butchers use, these cotton frocks. There is some of those, some articles would probably come under the category of clothing; also eggs, egg cases.

By Mr. Fiddes:

Q. Just a moment. On the cotton products, you would indicate that as being such a big one if it happened to be clothing?

A. There is cotton frocks, would probably be bags, cotton bags, cloth bags, or cotton bagging. Of course, cotton frocks or cotton bags and cotton bagging moved principally to the plants. Eggs is the last one.

By Exam. Peterson:

Q. Egg cases?

A. Egg cases.

[fol. 444] By Mr. Fiddes:

Q. You sent egg cases out to the towns?

A. We do not ordinarily, direct. They usually move from the plant, from the produce plant out to the farmer, packer of the eggs, whoever he might be,

By Examiner Peterson:

Q. Eggs is the last one?

A. Yes, extracts.

Q. Or flavorings?

A. Or flavoring, animal or poultry feeds, fertilizer and materials, food curing, seasoning preserving compounds; food preparations, forms, displays of dress fittings or parts; gelatine, glands, glue, glycerine, greases, ice cream freezers and cabinets.

By Mr. Fiddes:

Q. Those would go out to places where there would be no plant or branch?

A. Yes. We are in the ice cream business, also, not in the State of Minnesota.

Q. I am speaking about Minnesota as of July 1st, 1935?

A. Ice cream freezers, lard and lard substitutes, labels and tags, meats, fresh and/or cured, meat ~~boxes, empty~~;

meal, milk, buttermilk, liquid or otherwise; minerals, mince meat.

By Examiner Peterson:

Q. What kind of minerals?

A. Of course, we have minerals down there, what we term as Bomin. That is mineral feed to animals, for feeding purposes.

By Mr. Fiddes:

Q. Your answer on minerals of Bolin or Bomin: that is the kind of minerals mentioned on the exhibit, is it?

[fol. 445] A. Well, not exactly.

Q. Could there be other minerals besides that that go out to points where there is no branch?

A. The answer would be no.

Q. The answer would be no?

A. No.

Q. You had mincemeat?

A. Mincemeat is the last one. Oil foods, sediment and soap stock; oils, animal and vegetable; oleomarg-ine, packing house products, edible or inedible, pickles and relishes, dressed poultry, printed matter, premiums.

Q. Right there go ahead.

A. Salad dressings, oils, and sandwich spreads, salt, signs of all kinds, skewers and gambrels.

Q. What, incidentally, is that?

A. Skewers?

Q. Yes.

A. They are little wooden pieces that the butcher uses for tying up the roasts. Soap, powders, washing compounds, soda and alkali products, spices, stationery and office supplies, table sauces. That about completes the list.

By Examiner Peterson:

Q. You are not including lubricating oils?

A. No.

Q. Glands, what are they?

[fol. 446] A. Animal glands, edible or inedible.

Mr. Fiddes: Off the record.

(Discussion off the record.)

By Mr. Fiddes:

Q. Mr. Metzger, are you reasonably well familiar with the nature of the product hauled by Mr. Noble for Libby, McNeil & Libby?

A. That is an operation that is somewhat separate from us, but I am familiar with the Libby products.

Q. I believe you said he hauled for them at least canned goods.

Mr. Boyle: Canned goods, preserves and condiments.

By Mr. Fiddes:

Q. On July 1, 1935, do you know whether they had any plants or branches in Minnesota?

A. Are you turning to Libby, McNeil & Libby?

Q. Yes.

A. I couldn't say if they had a branch. I understood they had their sales office and warehouse, just sales office alone at the Minnesota transfer. I believe the testimony was that the shipments he made for Libby prior to July 1st were out of Chicago in all instances?

Mr. Boyle: I think that is true, Blue Island.

Mr. Fiddes: I don't believe he did any hauling out of the Twin Cities from any plant here.

Mr. Boyle: I don't so understand.

Mr. Fiddes: He has been sworn.

Mr. Boyle: Could we ask him a question?

[fol. 447] Mr. Fiddes: It is perfectly all right with me. On July 1st, 1935 or thereafter, did Libby, McNeil & Libby have plants or a branch in Minnesota to or from which you haul products?

Mr. Noble: To or from which?

Mr. Fiddes: Yes. Who was that from?

Mr. Noble: Minnesota Transfer.

Mr. Fiddes: These products you hauled for Libby principally moved from Chicago, I think you said, Mr. Noble?

Mr. Noble: Blue Island.

Mr. Fiddes: Some of them came to this branch in Minnesota, did they?

Mr. Noble: Well, they went either to the branch or various points in southern Minnesota. I think we have shown that some of this shipment, also our contract called for

movements at various places in the state of Wisconsin.

Mr. Fiddes: Let me put this question to you: did you ever haul supplies with any regular degree from the branch house of the Minnesota Transfer?

Mr. Noble: Any supplies for Libby, McNeil & Libby?

Mr. Fiddes: You did not haul supplies for Libby, McNeil & Libby?

Mr. Noble: No.

Mr. Fiddes: That, I think, will cover my point on the products; you did not haul for them principally canned goods?

Mr. Noble: Canned goods of various types.

Mr. Fiddes: Canned goods of various types.

[fol. 448] Mr. Boyle: That would include preserves and condiments?

Mr. Noble: Anything that they might manufacture.

By Mr. Fiddes:

Q. Now, Mr. Metzger, will you turn to exhibit 4? You have that before you?

A. Yes.

Q. This purports to be a partial list of commodities transported by the applicant, Mr. Noble from November 17, 1934 and up to August, 1938 in its entirety, the exhibit does. The last page I think is to August, Mr. Boyle. I take it — is all one exhibit, is it not?

Mr. Boyle: Oh, yes.

Mr. Fiddes: I understand that the record shows at this point the commodity shown as having been transported up to October 17, 1935 was transported by the applicant for Swift & Company or for Libby, McNeil, & Libby. Do you agree that the record shows that with two exceptions, one was the wallpaper that came up. The other was the load hauled for Moore Motor Freight, who acted as the broker in turning that shipment over to Mr Noble?

Mr. Boyle: I understand that to be correct.

Mr. Mattimore: I do not like to prolong this any more than necessary, but I think in my opinion it might be very useful if Mr. Metzger would do for us, with respect to exhibit 4 what he did with respect to 5. I think you can go through it in perhaps ten minutes or so, Mr. Metzger.

Mr. Boyle: You want him to eliminate the commodities?

[fol. 449] Mr. Mattimore: I want him to mention the

commodities shown on this exhibit that would have in the ordinary course of events on July, on or about July 1st, 1935 been transported by Noble into towns in which there was not a packing plant or branch of Swift & Company.

Examiner Peterson: I thought he included all the articles in the other list.

Mr. Moore: The other list, Mr. Peterson, is considerably smaller than this list.

Examiner Peterson: The other list, as far as Swift & Company is concerned, covers everything that has been transported by them, is that correct?

The Witness: That would practically be the same, yes.

Mr. Fiddes: For substantial purposes, the items shown on exhibit 5 that you specifically mentioned into the record would be the character of items hauled for Swift & Company on July 1st, 1935 in Minnesota to points where there was not located a plant or branches of Swift & Company. I point out the No. 5 list evidently was taken over a period of operations that extended from November of 1934 to July, 1935, and perhaps could be assumed to be substantially representative.

The Witness: In this exhibit there may be shipments other than ours, too.

Examiner Peterson: That is what I thought.

Mr. Fiddes: That is true. It covers, however, a great many articles, I suppose that the applicant may be claiming [fol. 450] a right to transport.

Examiner Peterson: Yes.

Mr. Fiddes: It is, at least possible, that his right to transport might be limited to what he would have transported in the kind of operations he was performing on July 1, 1935, if I make myself clear; but, I think that if the witness can testify that the numerous items he has mentioned specifically appearing on the first page of exhibit 5 would substantially cover the various articles which would have been transported by applicant for Swift & Company to points in which there was not located one of its plants or branches, he should do so.

By Mr. Fiddes:

Q. Could you so testify, Mr. Metzger?

A. You are referring to this list of items in exhibit 5?

Q. They are the ones that you mentioned.

A. You mentioned to points in Minnesota other than we have plants, branch houses, dairy and poultry plants?

Q. Yes, in other words you called off these items. I take it those were items for the most part, with a few exceptions, that are dealt in by Swift & Company and sold to customers of Swift & Company, or at least transported to customers of Swift & Company. Would that be true of those?

A. That would be true with this exception, if you are speaking of points in Minnesota, such as fresh meats, packinghouse products would originate at our plant in South St. Paul. It would be purely an intrastate movement.

By Examiner Peterson:

Q. Would you have a shipment of meats going from [fol. 451] Chicago to those points in Minnesota?

A. Oh, rarely. St. Paul and Minneapolis.

Examiner Peterson: I understood the witness to testify in connection with not only Minnesota, but Wisconsin.

Mr. Fiddes: I specifically limited it to Minnesota as of July 1, 1935.

Mr. Peterson: I would like to know if his testimony applies as well to Wisconsin?

Mr. Fiddes: The situation may be somewhat different in Wisconsin, because these truck routes were in effect there. They were not in effect in Minnesota.

Examiner Peterson: I understood the witness so to testify with respect to all points of the Swift branches, not only in Minnesota but in Wisconsin, Iowa and Illinois.

By Examiner Peterson:

Q. Is that correct, Mr. Metzger?

A. I understood the question to apply to only points in Minnesota.

Q. But your answer would really apply also to points in Wisconsin, wouldn't *that*? You refer to meats so that you will only confine them to Minnesota points. You have to eliminate two or three of the items you mentioned?

A. Well, that list as I called them generally would apply also to car route points in Wisconsin, Illinois and Iowa, and probably Grand Forks, North Dakota.

Mr. Fiddes: I think I have no further questions to ask.

Examiner Peterson: Any further questions?

[fol. 452] Mr. Edell: I have only about two questions.

By Mr. Edell:

Q. Have you already answered one of them as to whether or not that list would apply over here to car route lines in Wisconsin. Mr. Metzger, will you explain for the benefit of the record your method of handling these reshipments that were testified to by Mr. Noble, when Mr. Boyle stated there would be a witness from Swift & Company?

A. The shipments brought into our plant from interstate points from Chicago, Milwaukee and some other such points were brought in and receipted for at our dock by our receiving department, and receipt for the delivery of that product by our team dock or receiving dock to the drayman or carrier, whoever he might be. There is always an additional copy comes along which is sent up to our department, there are shipments in there that are going beyond. We route them out. We designate the routing and so on that information as the reshipping account, showing the destination and the routing on that paper which is then written up and sent back down to the loading department.

Q. As a matter of fact, Mr. Metzger, what you do is really aggregate freight out of the dock for a given point, isn't that true? Some of it will originate in your own plant and some will be shipped in from Chicago and some will be furnished by the suppliers for the Twin Cities. It is aggregated and forwarded as one consignment by the specified branch or point?

A. Not necessarily. These reshipping shipments are usually in the big demand. We move them out, if possible, [fol. 453] the same day that they arrive at our dock. We do not assemble them there or combine them into one shipment.

Q. Well, now, in going through Mr. Noble's proof yesterday I discovered some shipments from Chicago destined to San Francisco, or Portland, Oregon, they were routed Noble Trucking, St. Paul, it may have been aggregated with some other freight, and forwarded it on to its destination.

A. If on that day or the day thereafter it must have been a carload and we would include it. It may have been brought in by Noble from Chicago to that car.

Q. Otherwise you would let it go out at the LCL rate, at the combination rates over the Twin Cities, which would

exceed the through rates from Chicago to the ultimate destination?

A. That depends on the volume, depending on the volume.

Q. Well, in going through these bills of lading and shipping records of Mr. Noble, I find in there a number of shipments that Noble must have aggregated at Chicago on reshipment, which would take in freight that came from Georgia, freight from points in C. F. A. territory, and also freight originating with suppliers in Chicago, as well as freight coming out of your plant. Isn't that an aggregating of shipments consigned to you for South St. Paul?

A. Out of Chicago that is true.

Q. Isn't it also true that you do, not necessarily in every case, but in a great many cases aggregate in the same one [fol. 454] at St. Paul for points beyond?

A. Very rarely. Very rarely. I don't recall we have ever held up shipments enough to make any kind of a volume moving out.

Q. Because your rate is flat and is not based on any specific volume per shipment?

A. Are you referring to points in Minnesota now or any points?

Q. I am referring to points, let us say, in Wisconsin or North Dakota. I realize that your Minnesota rates are fixed by the Commission.

Mr. Boyle: You refer to a rate. We have to know the point.

Mr. Fiddes: I understand, Mr. Boyle, there has been no testimony as to rates. I am merely trying to find out why and how they aggregated and what this reshipping is. I am not trying to inject any rate testimony in this case.

Mr. Boyle: I want to object.

Mr. Fiddes: If it is not pertinent I will withdraw it. If it is permissible, all right.

By Mr. Fiddes:

Q. That is caused, is it not, where you ship outright by truck, your rate is so much per one hundred pounds, regardless of quantity?

A. To some of the interstate points, yes.

By Mr. Boyle:

Q. You are speaking about the minimum truck load?

A. The minimum truck load.

[fol. 455] By Mr. Fiddes:

Q. Not necessarily to any one point. It could be a truck-load. You have drop shipments at various points along the given route?

A. Well, those drop shipments on the route are begun principally in Wisconsin. We would not bring any shipments from Chicago to St. Paul and back-haul them half the distance back down there again.

Q. You would have two points in North Dakota to reship to?

A. Yes.

Q. That would also be true, would it not, to certain points in northwestern Wisconsin?

A. Yes. That has been the practice in the northern part, northwestern part of Wisconsin.

Q. Would it be possible, Mr. Metzger, for a shipment to be picked up from a local supply house in the Twin Cities and aggregated to your plant with local freight originating in a plant and also freight coming in from Chicago, all of which was destined, let us say, to Grand Forks, North Dakota, shipped on one bill of lading?

A. Yes.

Q. Now, it is feasible and practical operation to do that very thing. Referring to the scale that was mentioned a while ago during Mr. Noble's testimony, that scale could possibly have been picked up from Fairbanks, Morse in St. Paul, could it not?

A. Yes.

[fol. 456] Q. It would not be necessary to follow that particular scale through, I believe, to Detroit Lakes or some Minnesota point as an interstate shipment?

Mr. Boyle: That is a question of law now whether it is interstate or not.

Mr. Fiddes: It would not if it was picked up locally from Fairbanks Morse.

Mr. Boyle: I object to the question.

Examiner Peterson: Can he tell us just how the shipment was handled?

Mr. Boyle: I asked him that.

Mr. Fiddes: Of course, it is impossible without going to Swift & Company's purchase records to determine where that particular scale came from. We do know that Fairbanks Morse maintain a warehouse in Twin Cities. It is possible that the scale was drawn from local stock. It does happen that that shipment was destined to a Minnesota point.

Examiner Peterson: If the shipment was drawn from local stock it would apparently be intrastate.

Mr. Fiddes: That was the point. It seems so apparent that it must have been an interstate shipment, because it must have been hauled in from Chicago, and it remains that Fairbanks definitely carries warehouse stock at Twin Cities.

Mr. Boyle: The question was predicated upon an assumption that the scale actually did come from Fairbanks Morse. [fol. 457] Mr. Fiddes: If it came from St. Paul and moved back to a Minnesota destination it would have been an intrastate shipment, would it not?

Mr. Boyle: We will admit that the movement of any item from St. Paul, Minnesota to any other point in Minnesota, without passing out of the state enroute, strictly speaking, without proceeding by any outside transportation of any kind, a movement from St. Paul, Minnesota to some other point in Minnesota is intrastate.

Exam. Peterson: Yes.

Mr. Fiddes: Off the record.

Mr. Boyle: Are you through?

Mr. Edell: I think that is all.

Exam. Peterson: I would like to ask him a few questions.

By Exam. Peterson:

Q. Now, beginning in Minnesota, what are they in North Dakota?

A. The plants?

Q. Yes; July 1, 1935 and before that?

A. Are you referring to a packing plant?

Q. A branch plant.

A. We have one for Fargo, North Dakota.

Q. Fargo?

A. A branch house.

By Mr. Van Osdel:

Q. As of July 1, 1935?

A. New Rockford, North Dakota, dairy and poultry plant. I believe those are the only two that we have.

[fol. 458] By Examiner Peterson:

Q. Between July 1st, 1935 and October 15, 1935, did you have any additions?

A. No, there have been no additions made.

By Mr. Boyle:

Q. You do have cream buyers, for instance, through the country generally, located at all surrounding points to whom shipments would be made?

A. I understood your question to be where we have plants, branch houses or dairy and poultry plants.

By Examiner Peterson:

Q. Yes, they have in Minnesota?

A. We have branch houses.

Q. July 1st, 1935?

A. Yes, sir, branch houses in St. Paul, Minneapolis, Duluth, Minnesota. We have a packing plant at South St. Paul, and Winona, Minnesota. We have dairy and poultry plants at Detroit Lakes, Minnesota, Marshall, Montevideo, Breckenridge, Sauk Center, Waseca.

Q. That is all in Minnesota?

A. That is all in Minnesota.

Q. Wisconsin?

A. I am only familiar with one dairy and poultry plant in Wisconsin. That is located at LaCrosse. We have a plant located at Milwaukee, Wisconsin. We have branch houses in Green Bay, Sheboygan, Fond du Lac, Oshkosh, Appleton. That is about all I can recall.

Q. Now, in Illinois?

A. Well, Illinois, I am not so familiar with, because we [fol. 459] only have the northwestern part as our trade area. You understand, of course, that our home office and plant is in Chicago.

Q. Iowa?

A. I am not familiar with the branch houses and plants, dairy or poultry plants in the state of Iowa. I understand there is quite a number of dairy and poultry plants.

By Mr. Fiddes:

Q. I take it your questions refer to the State of Iowa, for instance, would be to that part of Iowa that the applicant is claiming?

Examiner Peterson: Yes.

By Examiner Peterson:

Q. Are you familiar with that part of Iowa, and the part of Illinois that the applicant is claiming grandfather rights?

A. We have branch houses in the city of Chicago but I am not in a position now to recall the name of them, what they are called or designated down there. I can't recall all of them.

Q. In the city of Chicago?

A. Yes.

Q. I am interested more in the points——

A. I don't know of any branch houses.

Q. There is a plant in Chicago?

A. There is a plant in Chicago, yes.

Q. Do you have any outside of Chicago in Illinois, and any in applicant's claimed territory?

A. Not that I can recall.

Q. In Iowa, any in applicant's claimed territory in Iowa [fol. 460] where you are familiar with the points?

A. We have various produce, dairy and poultry plants in the state of Iowa.

Q. If you can recall?

A. I know some of them. I couldn't mention all of them. We have some packing plants in the state of Iowa. I know one at Des Moines, Iowa. They have one at Sioux City. They have, I presume, a branch house. I know of one branch house that we have in Des Moines.

Q. There aren't any other witnesses from Swift & Company here that can testify to the points in Iowa?

A. All of the points in Iowa?

Q. In the territory claimed by applicant?

A. We could probably furnish that information.

By Mr. Boyle:

Q. What is the question?

A. The plants, branch houses and other dairy and poultry plants in Iowa.

Mr. Fiddes: I am not interested. I do not know of anybody here that is.

Examiner Peterson: Yes. I think the Commission here would like to have a list of the points in Iowa where you have branch plants or produce houses.

The Witness: In the State of Iowa?

By Examiner Peterson:

Q. Yes.

A. In the applicant's application?

Q. In the applicant's claimed territory, also in Illinois, if [fol. 461] there are any?

A. Illinois, I think we covered that.

Q. We covered that?

A. Yes. You might want a list of the branch houses in the city of Chicago.

Q. No.

A. I didn't mention them.

Mr. Boyle: Does the Examiner's question refer to poultry plants?

Examiner Peterson: Yes.

Mr. Boyle: Just the plant?

The Witness: Dairy and poultry plants, yes. I would include the cheese factories in them.

By Mr. Boyle:

Q. Have you endeavored to include the cheese factories?

A. I don't recall those. We may have some cheese factories in the State of Wisconsin. I am not familiar with where they are located. There may have been one at Green Bay or Manitowoc.

By Examiner Peterson:

Q. Then, you could furnish us within five days a list of the branch plants or produce houses or poultry houses in Iowa?

A. In the state of Iowa?

Q. Yes?

A. Yes, we can have that here tomorrow.

Examiner Peterson: All right, that will be better.

By Examiner Peterson:

Q. The articles listed in your exhibit, exhibit number 4 or [fol. 462] 5, that you did not mention, like the abrasives, asphalt, tar, automobile parts, et cetera, would they move, did they move to branch plants?

A. Plants, branch plants, dairy and poultry plants.

Q. They did?

A. Yes.

Q. All the articles, electric motors, dynamos, machinery?

A. Yes, sir.

Examiner Peterson: Very well.

Mr. Overmyer: I have a question.

By Mr. Overmyer:

Q. Mr. Metzger, what facilities, if any, did your company maintain at these break bulk points?

A. We maintained no facilities.

Q. Prior to the time Mr. Noble was engaged to make the deliveries to the customers themselves, what disposition did he make of the shipments that went to the break bulk points?

A. They are usually delivered to the local drayman that had a warehouse or platform or receiving dock, whichever he had.

Q. And do you say that such shipments as that were billed to the drayman?

A. Swift & Company care of that drayman, yes, sir.

Q. Would he then proceed immediately to make deliveries of that?

A. Not in all cases, no.

Q. Is it true that the shipments were not billed then to the customers in the towns that he would serve?

A. There was billing furnished, it was available to the [fol. 463] drayman at the break bulk point. They were turned over to him and the billing prepared by us.

Q. Do you know whether or not any of those draymen ever filed applications to establish grandfather rights in connection with the handling of interstate shipments?

A. We investigated those that were used. From the evidence submitted to us we assumed they complied with all the requirements of the motor carrier act.

By Mr. Boyle:

Q. What car routes would you have there in this delivery that went interstate after the break bulk points—that would only be interstate considering the origin?

A. There would be a few in the southeastern section of Wisconsin.

Mr. Overmyer: Mr. Boyle, I was examining the witness.

Examiner Peterson: Let us have a little quiet, please.

Mr. Boyle: It borders on the question as to the distinction between interstate and intrastate. That is the point I want to avoid in this undertaking. I just want it clear. That is all.

By Mr. Overmyer:

Q. Now, so far as these draymen are concerned, you say that you had written agreements with them?

A. If they were contract carriers. Some of them were common carriers.

Q. You cancelled those out on fifteen days notice, those that had contracts, is that right?

A. Not all on exactly fifteen days notice. Some of them [fol. 464] extended longer than that.

Q. This conference that you had with Mr. Noble took place in the early part of February, 1935?

A. February, 1935.

Q. How soon after that was it that he had his first truck built according to your specifications?

A. I couldn't say as to the exact date. I believe Mr. Noble testified to that.

Q. As a matter of fact, he said a month or six weeks, didn't he?

A. I don't recall just now what he said.

Q. Do you have any recollection yourself as to when that first truck was constructed?

A. It appeared to be about that time, yes.

Q. In spite of that fact, though, you did not commence service to the customers through Mr. Noble until October 16th or 17th, 1935, is that correct?

A. That is correct.

Q. By October 17, 1935, how many trucks did Mr. Noble have equipped for the service he was going to render?

A. I am not in a position to state how many trucks he had.

Q. Did you make any inquiry as to whether or not he had applied for authority to render that type of service?

A. We knew that he filed an application with the Interstate Commerce Commission.

Q. Did you check up or did somebody else check his application?

A. I personally did not check it, no, sir.

[fol. 465] Q. Did you inquire whether or not such a movement might constitute a violation of the law?

Mr. Boyle: I object to that question: That is a legal question. He has already answered enough. I object to any further examination along that line. The issue here is to determine what his rights are.

Examiner Peterson: Objection overruled.

The Witness: What was the question, please?

(Last question read.)

The Witness: It was our policy——

By Mr. Overmyer:

Q. The question is did you inquire either of your lawyers or of the officials of the Interstate Commerce Commission?

A. I personally did not. I don't know whether it was done in our Department down there at that time or not.

Q. So far as you were aware was the subject ever discussed?

A. Yes.

Q. Whether or not such operation was legal or illegal?

A. Yes. I have discussed it.

Q. Well, you discussed it when? Prior to the institution of the service or after the institution of the service?

A. I couldn't say about that. It was probably discussed a good many times, whether prior or after.

Q. Well, can't you recall when the discussion was with reference to the right of Mr. Noble to engage in the service, or whether or not he had already launched upon an illegal [fol. 466] operation?

Mr. Boyle: The question that you are asking is confined to October 17; 1935, is that it?

Mr. Overmyer: Those operations in Wisconsin, when he commenced October 17, 1935, and involving deliveries to the customers themselves, that is what I had in mind.

Mr. Boyle: I do not know whether the Commission at that time had prescribed any form for making application. I personally do not think they had.

Mr. Van Osdel: Oh, yes, surely.

Mr. Overmyer: All I am interested in is knowing whether it was done. Was this witness charged apparently in part with the responsibility of launching this program?

By Mr. Overmyer:

Q. You made no inquiry before it was launched to ascertain its legality?

A. I had discussed that feature of it with my superior officers at that time and we came to the conclusion that his application was proper enough that we considered it was not an illegal operation.

Q. So far as you are aware no conference was had by you with the officials of the Interstate Commerce Commission to get their view of that, is that correct?

A. Not from South St. Paul. We may have discussed it with Mr. Hustleby over here. I don't recall whether it was ever brought up to him.

Q. You may have done a good many things, your recollec-[fol. 467] lection is there was no such discussion that you yourself know of with anybody particularly?

A. With the officials of the Interstate Commerce Commission?

Q. Yes.

A. Yes.

Q. I don't know now whether it is absolutely clear. Prior to Mr. Noble making these deliveries to the customers, you say, do you not, that Swift & Company prepared in some instances a billing at South St. Paul covering the movement of the shipment from South St. Paul to the customer in one of these car route towns, is that correct?

A. From South St. Paul?

Q. Yes.

A. That billing that we furnished down there from South St. Paul was to the break bulk point.

Q. Didn't I understand you to say that the same billing was given to the drayman?

A. At the break bulk point for covering his distribution from that break bulk point within the town and the surrounding territory.

Q. Did that billing cover the shipment from South St. Paul to the customers in that area?

A. Not direct from South St. Paul, no.

Q. Did the drayman, so far as you know, prepare a separate billing for the shipment?

A. I don't believe he did, unless he happened to be a [fol. 468] common carrier. I think in some instances they did.

Q. Prior to Mr. Noble's handling this service from South St. Paul to the break bulk point, hadn't you used any other motor carrier in that type of service?

A. We used other motor carriers. We used our own equipment at times and the rails.

Q. How long had you used motor carriers in service from South St. Paul to the break bulk points prior to the time that Mr. Noble performed that service?

A. Oh, I couldn't say definitely how long before that time.

Q. Well, it is clear now then, is it not, that Mr. Noble's service did not supplant a rail service to the break bulk points, at least in every instance, is that true?

A. It has supplanted the rail service and other truck service.

Q. Do you say that competitive conditions prompted you to make this arrangement with Mr. Noble for the transportation of the commodities from South St. Paul directly to the customer?

A. Yes.

Q. And I understood, in response to Mr. Boyle's question, that competition was from other packing companies, that is true?

A. South St. Paul and other points.

Q. Yes. Now, so we understand that, other packing companies were using a method then of direct distribution?

A. Yes, they were.

Q. And for what period of time had they used that direct method of distribution?

[fol. 469] A. I couldn't say as to the definite time.

Q. Prior to October 17, 1935, how long had that service been used by other packing houses?

A. I was not familiar with all of their operations. I couldn't say the definite time, maybe a year, a year and a half, two years prior.

Q. In any event it was prior to February, 1935, wasn't it, because that was one of the things that prompted you to call Mr. Noble in, isn't that right?

A. Yes, sir.

Q. So that you knew of arrangements for more expeditious service as early as February, 1935?

A. Yes.

Q. In spite of the fact that the service was not actually inaugurated until October 17, 1935, you didn't know of any consultation with the Commission with respect to the legality of that operation?

Mr. Boyle: He has already answered that he did not. Must we go over it?

Mr. Overmyer: All right, I am satisfied.

Examiner Peterson: There is one more question I would like to ask the witness.

By Examiner Peterson:

Q. With respect to the electrical motors, for example the movement of such articles would be very infrequent. You might make one shipment to one of your branch houses once a year, perhaps?

[fol. 470] A. That is correct.

Q. Or maybe once in two years?

A. That is correct.

Q. And likewise grindstones?

A. That is correct.

Q. Very infrequent?

A. To our branch houses?

Q. To one of your branch houses?

Mr. Boyle: Very infrequent.

The Witness: Very infrequent.

By Examiner Peterson:

Q. Once a year, once in two years?

A. Yes.

Q. How about fruits and vegetables? How often would you make shipments to branch houses?

A. Well, as to fruits and vegetables, I don't believe that is ours, unless it came in to our plant—dried fruits and vegetables.

Q. That was infrequent, also?

A. I would not say as to that, dried fruits, juices, vegetables and that sort.

Q. How about salts, aluminum and zinc salts, scientific instruments?

A. Infrequent shipments.

Examiner Peterson: We will adjourn.

Mr. Boyle: Are we through with this witness?

Examiner Peterson: The witness is excused.

Mr. Boyle: Do we understand the witness is excused? [fols. 471-473] Examiner Peterson: Yes.

Mr. Boyle: All right.

(Witness excused.)

Mr. Van Osdel: Before we adjourn some of us would like to get away in the morning. One has already left. What is the situation with regard to how many witnesses you will have?

Mr. Boyle: I have got to be out of here at twelve, on the plane, as soon as we can get one.

Mr. Van Osdel: Any more Swift witnesses or Kraft Cheese witnesses?

Mr. Boyle: Not on the applicant's case in chief, there will be no Swift witnesses. What I may have to call in rebuttal is problematical.

Mr. Van Osdel: So far as your case in chief, this concludes it?

Mr. Boyle: No. I would hope and practically believe that probably with one more witness I shall rest, that witness' direct testimony will not take a half an hour.

Mr. Van Osdel: Does that concern my territory out in North Dakota or Minnesota? Is that Phenix?

Mr. Boyle: Cheese.

Mr. Van Osdel: Phenix Cheese?

Mr. Boyle: Yes.

Examiner Peterson: We will adjourn now until 9:00 o'clock tomorrow morning. (At 10:00 o'clock P. M. adjourned until 9:00 o'clock A. M. September 23, 1938.)

[fol. 474] St. Paul, Minnesota, September 23rd, 1938.

Before C. J. Peterson, Examiner, Interstate Commerce Commission

Met pursuant to adjournment at 9:00 o'clock A. M.

Appearances:

As heretofore noted.

Proceedings

Examiner Peterson: Proceed.

J. H. ALBRECHT, was sworn and testified as follows:

Direct examination.

By Mr. Boyle:

Q. What is your name?
A. J. H. Albrecht.
Q. Your address?
A. 1978 Ashland Street, St. Paul, Warehouse Superintendent, Kraft Phenix Cheese.
Q. Where are the headquarters of Kraft Phenix Cheese?
A. Chicago, Illinois.
Q. I take it they are in the business of manufacturing and distributing cheese?
A. That is right.
Q. And kindred products?
A. Yes, sir.
Q. Various salad dressings?
A. Malted milks, caramels.
Q. Where are their plants located with particular respect to the territory we consider here, the particular cities?
[fol. 475] A. Green Bay, Wisconsin, Freeport, Illinois, Chicago, Illinois, Beaver Dam, Wisconsin, Antigo, Wisconsin and Wausau.
Q. Wisconsin?
A. Yes, sir.
Q. What is that they have in the Twin Cities, a warehouse, you say?
A. Yes, sir.

Q. What operation takes place in connection with their business at the warehouse, with particular respect to distribution of products?

A. Well, the merchandise is moved into the Minneapolis warehouse and distributed to the northwest, to our distributors and wholesale grocers, and also one town, Plymouth, Wisconsin.

Q. Where are the products coming into Twin Cities from east and south as contra distinguished from west, if any, received from usually?

A. Received from the points I mentioned.

Q. That is Wisconsin points and Chicago?

A. Yes, sir.

Q. What is their method of transportation?

A. At the present time?

Q. Yes. Then we will go on.

A. At the present time we are being serviced by Noble Transit from all points in Wisconsin and Chicago, Illinois.

Q. How about rail transportation?

A. Very little.

[fol. 476] Q. It has been testified there was a contract or is a contract between Kraft and Noble. To the best of your knowledge, is that a fact?

A. Yes, sir.

Q. And that was entered into on or about what date?

A. June 1st, 1935.

Q. Was that for the transportation of Kraft commodities in this territory?

A. Yes, sir.

Q. Now, at the time that contract was entered into, meaning on June 1, 1935, what was the method of handling the product of Kraft's in this territory by transportation and distribution?

A. Up to June 1, 1935, we were getting our merchandise in from the east by carloads to our Minneapolis warehouse and was redistributed to the northwest by truck and rail.

Q. Why did you depart from that method of distribution to a movement by truck into the warehouse?

A. There were two reasons: The first reason was that our business at the time was expanding by leaps and bounds and we were tied down with the lease in our warehouse and we were getting to a point where we were unable to give competent service any more. So, we conceived the idea of

arranging standing orders, that is, an order that comes every week from some point in Wisconsin or Illinois, or Chicago, to be delivered to our larger accounts in Minnesota. At the time we thought of the Twin Cities. We have [fol. 477] large accounts in the Twin Cities; one is the Brustman, and the other is the Magara Cheese Company. We figured if we could get these two accounts on a standing order they would ship then from Green Bay, for instance, and that the merchandise would never see our warehouse and you would be given better service than we could give from our warehouse.

Q. That is better than by rail and distribution?

A. Yes.

Q. What do you mean by better service? Does that have in mind any saving in time or better carriage of the commodity, or what?

A. Better service, I mean saving of time. Our service from Green Bay by rail took two days to get it to Minneapolis alone. After it came to Minneapolis it was usually four to six hours before it was spotted to our warehouse that we could unload it; while trucks from Green Bay leave any time, any evening and arrive at our warehouse at eight o'clock in the morning, the same as from Freeport, Illinois and Chicago, Illinois.

Q. Then, when this contract was entered into on June 1, 1935, the Noble, was there any other trucker other than Noble that was making this distribution from Green Bay and Wisconsin points direct to these places that you speak of?

A. No, sir.

Examiner Peterson: What places are these?

Mr. Boyle: The destination points.

Examiner Peterson: Yes.

The Witness: St. Paul, Minneapolis.

[fol. 478] By Examiner Peterson:

Q. You say there were not any other truckers moving to those points that your are speaking of?

A. Not for us.

Q. What points are you speaking for?

A. Green Bay and Chicago, Illinois.

Q. I see.

A. To the Twin Cities and any point in Minnesota. At the time I am talking about the Twin Cities.

Q. There were not any truckers available at that time?

A. I didn't say that. I said we were not using any.

Examiner Peterson: Oh.

By Mr. Boyle:

Q. Now, you say that this involved, this arrangement involved a change over from a previously established method of rail shipment into the Twin Cities and distribution out by truck. Was it possible to make that change comparatively overnight, in short order, or did it take some time to work out the details?

A. It took several months. We had to go back over a period of two years and look into the purchases of these two accounts. Not only those two, but our own warehouse so that we could determine a decent standing order to ship to these fellows and to our own branch very week. The reason we wanted these standing orders—I gave you one, the other one is that at the time our Green Bay plant, when they got busy they expected to hire other employees.

Q. What sort of employees?

[fol. 479] A. Well, to get the cheese out, to manufacture it; and when time was slack the regular employees were laid off, so the union insisted that we give the regular employees so many hours a week and to do this our company in Chicago insisted, not only told us to, but insisted that we get standing orders from our two accounts in St. Paul and Minneapolis to our own warehouse.

Mr. Fiddes: When was that? If we are going to discuss things we had better have the dates.

The Witness: June 1, 1935.

Mr. Mattimore: If the Examiner please, I can't see how this has anything to do with the plants' rates.

Examiner Peterson: There is a little history.

Mr. Boyle: I do not see how you are going to get it, Mr. Examiner, without some background or history.

Examiner Peterson: It is not to be considered as a convenience and necessity.

Mr. Boyle: Is anybody going to talk at this late hour about saving time?

Examiner Peterson: Go ahead, proceed.

By Mr. Boyle:

Q. When did the movement by the Noble Truck or Transit company, of your products actually begin?

A. To the best of my knowledge I would say about March, 1936.

Q. And did it take the period intervening between June 1, 1935 and that time to figure the details as of this change and distribution of the sales method?

A. Yes, sir.

[fol. 480] Q. Since the date in March, 1936, that the movement began has it been continuous out of these points by the Noble Transit Company since?

A. Yes, sir.

Mr. Boyle: At this point, Mr. Examiner, I should like to ask the witness whether the service is satisfactory, whether it is an improvement, whether it has helped him increase business.

Examiner Peterson: I don't think that is pertinent.

Mr. Boyle: And I take it that you would rule upon objections, the same as you have ruled before.

Mr. Fiddes: Let it be understood the objection would have been interposed.

Mr. Boyle: Let it be understood that I should like to ask those questions that this may be considered as an offer of proof, that his answer would be in the affirmative. It has been objected to and the objection sustained and an exception taken by the applicant.

Mr. Fiddes: That is all understood.

Mr. Boyle: You may have the witness.

Cross-examination.

By Mr. Fiddes:

Q. You say you entered the contract with the Noble Transit Company on June 1st, 1935?

A. Yes, sir.

Q. He actually began hauling for you in March, 1936?

A. Yes, sir.

[fol. 481] Q. He did not haul prior to that time because it took that long to perfect the details, you say, of the changing over?

A. Yes, sir.

Q. What details were those?

A. I think I mentioned that we went over their purchases for two years.

Q. Whose purchases?

A. Purchases from Magara Cheese Company and Brustman Cheese Company.

Q. Yes.

A. To get his standing order, what we call an order, the same kind to be shipped every week from Green Bay to those two fellows in our own warehouse.

Q. When did you start going over their orders for several years back?

A. Immediately upon receipt of a letter from Chicago that a contract was signed between Noble Transit and ourselves.

Q. I understand you entered the contract with the Noble Transfer before you knew whether it would be possible or not to make arrangements for the standing order?

A. It was not an idea of whether or not it was going to be possible. I said I insisted on these whether they liked it or not.

Q. Whether these customers liked it or not you were going to insist upon it?

A. They are our distributors.

[fol. 482] Q. How long did it take you to go over their orders for a period of two years previous to June 1st, 1935?

A. Until we put in the first order that came from Green Bay on March 1st or thereabouts.

Q. I understand it to be your testimony that from June 1st, 1935 to March, 1936, you were going over the list of orders that you received from these two customers?

A. Yes, sir.

Q. You received your first standing order and perfected your arrangement for the standing order on March 1, 1936?

A. About that day? I am not sure of the date.

Q. Was it understood on June 1st, 1935 that it would take a considerable time to perfect these details?

A. I believe it was.

Q. You knew that in advance, did you not?

A. I couldn't say for sure.

Q. There was nothing extraordinary about this business, was there? I mean you ran into no extraordinary difficulties?

A. Well, I would say it was difficult doing it.

Q. You knew it would be difficult doing it? You knew what job you had to do, didn't you?

A. Oh, yes, sir.

Q. You understood it would take you a number of months to do it, did you not?

A. I imagine we did.

Q. You knew you would not arrive at the point where you [fol. 483] could arrange for standing orders until you completed this work, did you not?

A. Yes, sir.

Q. And the understanding was with Mr. Noble, was it, when these standing orders were completed Mr. Noble was to provide the service by which the goods embraced in those orders would be delivered from the points mentioned in Wisconsin Illinois to two customers?

A. Yes, sir.

Q. Who were located in Minneapolis?

A. And St. Paul at the time.

Q. And St. Paul at the time?

A. Yes.

Q. When the arrangements were completed on March of 1936, it was to those two customers from those points that Mr. Noble hauled?

A. Yes, sir.

Q. And how long did that situation remain?

A. It is still in operation.

Q. And the purpose of entering into this contract with Mr. Noble was that you may meet this situation that happens through the insistence of your managing officials in Chicago that you make arrangements for standing orders with these customers?

A. That is right.

Mr. Fiddes: That is all.

By Mr. Maftimore:

Q. After this contract was made in June, 1935, where was [fol. 484] the source of supply for these two customers in Minneapolis?

A. Before?

Q. Yes.

A. Our Minneapolis warehouse.

Q. Your Minneapolis warehouse?

A. Yes.

Q. And your Minneapolis warehouse was receiving those supplies from where?

A. Green Bay, Chicago, Freeport, and all other points in Wisconsin.

Q. You had no use for the Noble Transit Company between the time that contract was made and the time you started to furnish these two accounts directly from Green Bay?

Mr. Boyle: Well, just read that question again, please.

(Last question read.)

Mr. Boyle: I object to the form of the question, "you had no use for them."

By Mr. Mattimore:

Q. You did not use them?

A. No, we did not use them.

Q. When you entered into this contract with Noble, in 1935, you knew that you were not going to be able to use it until long after July 1, 1935?

A. Well, I would not say that.

Q. You knew it was going to take you several months, didn't you?

[fol. 485] A. Yes, sir.

Q. To accomplish this?

A. Yes, we knew that.

Q. And you did not intend to use Noble until such time as this check was made?

A. That is right.

Mr. Mattimore: I think that is all.

Examiner Peterson: Any further questions?

(No response.)

By Examiner Peterson:

Q. Does Noble Transit Company serve you in Wisconsin, Minnesota, Iowa and Illinois, all four states?

A. Not in Iowa.

Q. Not in Iowa?

A. But in North Dakota.

Q. North Dakota?

A. Yes.

Q. What points in North Dakota?

A. Fargo, and Grand Forks.

Q. To what points in Minnesota does he serve you?

A. Twin Cities, Rochester, Mankato, St. Cloud and Duluth.

Q. Did he serve you at these points beginning in March, 1936?

A. No, not those points.

Q. What points did he serve you in March, 1936?

A. St. Paul and Minneapolis.

Q. When did he begin serving you at Rochester and Minneapolis?

Examiner Peterson: He said Twin Cities.

[fol. 486] Mr. Fiddes: He said Minneapolis and St. Paul.

Mr. Boyle: He said Minneapolis and St. Paul right at the start.

By Examiner Peterson:

Q. You are serving both?

A. Yes.

Q. He is serving you both at Minneapolis and St. Paul now?

A. Yes.

Q. He did not serve you in Minneapolis in March, 1936?

A. Absolutely.

Q. I asked you and you said St. Paul.

A. St. Paul and Minneapolis.

Q. When did he begin serving you at Rochester, Mankato, St. Cloud and Duluth?

By — Fiddes:

Q. If you are able to testify from present knowledge at this present time, I take it the documentary proof would show what the first dates were.

A. I couldn't say offhand what the dates were, but some time in 1937.

Mr. Boyle: I think they would appear—if the Examiner would permit the suggestion—in the exhibits that have been filed on the particular dates.

Examiner Peterson: Very well.

By Examiner Peterson:

Q. In Wisconsin, what points did he serve in March, 1936?

A. Green Bay.

Q. At what other points did he begin serving you after [fol. 487] March, 1936? or is he serving you at the present time?

A. Plymouth, Wisconsin; Beaver Dam, Antigo and Wausau. That is about all.

Q. In Illinois?

A. Freeport, Illinois and Chicago, Illinois.

Q. In March, 1936 or after?

A. After.

Q. At both points?

A. Yes.

Q. Did you look into the rights of the applicant when his service began or did some one connected with your company do so?

A. Some one connected with our company in Chicago notified me.

Q. Notified you to begin using——

A. Operations.

Q. —Noble?

A. Yes.

Examiner Peterson: That is all.

Mr. Fiddes: Off the record.

By Examiner Peterson:

Q. What are the commodities that the Noble Transit has moved for you?

Mr. Fiddes: On March, 1936?

By Examiner Peterson:

Q. Yes, March, 1936?

A. Cheese, sandwich spreads, salad dressing.

Q. Do you manufacture caramels, too?

A. No, sir.

Q. You do not move any caramels?

[fol. 488] A. No, sir, not them.

Q. He began moving these articles for you in March, 1936, and that is all he has been hauling for you?

A. No. He has been hauling malted milk for us. That is at a later date.

Q. That is at a later date?
A. Yes.
Q. That is all?
A. That is all.

Examiner Peterson: Any further questions?

Redirect examination.

By Mr. Boyle:

Q. I have one. Was it a necessary preliminary to the perfecting of this change and distribution that you first be assured of the fact that you had a reliable trucker?
A. Yes, sir.

Mr. Boyle: I have no further questions.

By Mr. Mattimore:

Q. You did not have anything to do with the selecting of the trucker, did you?
A. Well, we were solicited by Mr. Noble in the Minneapolis warehouse.

By Mr. Boyle:

Q. It was not determined by you in your office at Minneapolis?
A. After all, we do have something to say in Minneapolis in regard to who we are going to have haul the merchandise, whether Chicago O. K.'s the deal or not.
[fol. 489] Q. Did you make the selection?
A. We offered Mr. Noble to our Chicago office.

By Examiner Peterson:

Q. Well, in offering Mr. Noble to your Chicago office, did you look into the rights of Mr. Noble?
A. No, I don't believe we did in Minneapolis. Our Chicago office did.
Q. You say you recommended him?
A. We did.
Q. How did you know that the Chicago office looked into his rights?
A. I don't say that they did.

By Mr. Boyle:

Q. The fact is that your traffic manager, in Chicago, Mr. Ott, is also a lawyer, is he not?

Mr. Fiddes: I object to the question as being wholly immaterial. There is no direct presumption that lawyers look into the law.

Examiner Peterson: Objection overruled. The witness is excused.

(Witness excused.)

Mr. Boyle: At this point the applicant rests.

Examiner Peterson: We will have a recess.

(A recess had.)

Examiner Peterson: Are you ready, Mr. Mattimore?

Mr. Mattimore: Yes, I am.

[fol. 490] W. J. GLENDENNING was sworn and testified as follows:

Direct examination.

By Mr. Mattimore:

Q. What is your name?

A. W. J. Glendenning.

Q. Your address?

A. 480 Broadway, St. Paul.

Q. What is your business, Mr. Glendenning?

A. I am in the long distance trucking business.

Q. In what states do you operate?

A. Minnesota, Wisconsin, Iowa, Illinois and North Dakota.

Examiner Peterson: May I ask here the name of his business, the corporation?

By Mr. Mattimore:

Q. What is the name?

A. Glendenning Transfer Service.

Q. Were you so operating on July 1, 1935, and prior thereto?

A. Yes, sir.

Q. And since that time?

A. Yes, sir.

Q. And you are still operating?

A. Yes, sir.

Q. Are you a contract carrier or a common carrier?

A. A common carrier.

Q. Of what?

A. Of general commodities.

Q. Specializing in any particular — ?

[fol. 491] A. Specializing in refrigerator trucks.

Q. You have a large fleet of trucks?

A. Forty five.

Q. Are they in any way equipped, specially equipped?

A. They are all built for the purpose of hauling perishable products. They all have four inches of dry zero insulation, four inches of cork between the floors. They are about as good refrigerated bodies as can be built.

Q. Did you ever haul freight for Swift & Company?

A. I started hauling for Swift & Company in 1929. I have been hauling ever since.

Q. You have been here in the hearing room for the last two days?

A. Yes, sir.

Q. You have heard the testimony of the various witnesses?

A. Yes, sir.

Q. Including the testimony of Mr. Noble?

A. Yes, sir.

Q. Calling your attention, Mr. Glendenning to applicant's Exhibit 3——

Exam. Peterson: Just a minute now; Applicants—oh, yes, that is all right.

By Mr. Mattimore:

Q. I will ask you whether or not you ever operated into some other territory shown in that exhibit for Swift & Company?

A. I handled all the points on route 1 and 80 on the first [fol. 492] page up until August 13th, 1937.

Q. August 13, 1937?

A. Yes, August 13, 1937. That is, with the exception of the break point, Janesville points—in other words, all of the points between break point Eau Claire which is underscored, down to break point Janesville, which is underscored.

Q. Are there any other points in that exhibit that you serve for Swift & Company?

A. Yes, I handle all of the points listed in break point La Crosse, route numbers 52, 47, 67, 62 and 36, down to break point Green Bay; and I handled all of these points up until August 13, 1937.

Q. From what period?

A. From approximately 1932.

Q. Now, that operation that you just spoke of includes the operation from South St. Paul to Eau Claire, Wisconsin?

A. Yes, sir.

Q. And then distribution in that vicinity?

A. Yes, sir.

Q. And those towns listed under those car route numbers?

A. Yes, sir.

Q. Break bulk points?

A. Yes, sir.

Q. And is the same situation existing, or did it exist between South St. Paul and Eau Claire?

[fol. 493] A. You mean La Crosse?

Q. Or La Crosse?

A. Yes, it did.

Q. And Rice Lake?

A. No, sir.

Q. It didn't?

A. No, sir.

Q. You would handle Rice Lake?

A. No, sir, I never handled Rice Lake.

Q. You do not handle Rice Lake?

A. No, sir.

Q. Now, Mr. Glendenning, do you have the freight bills?

A. Yes, I have.

Q. For that period?

A. Yes, sir, I have.

Mr. Boyle: Are they intended to prove the statement that he handled shipments during that time for Swift & Company?

Mr. Mattimore: That is the purpose.

Mr. Boyle: We will admit that without further proof.

Mr. Mattimore: All right.

By Mr. Mattimore:

Q. Will you state the period that that covers, Mr. Glendenning?

A. I have statements made up here from a period of May 5th—May 25th, 1935, and I think I have four exhibits showing different times until August, 1937. Here is another one in November, 1935. Here is one in August, 1935, and [fol. 494] the last one is in August, 1937.

Mr. Boyle: This is from St. Paul to the points that you have enumerated, at least by description of the routes?

Mr. Mattimore: On Exhibit 3.

Mr. Boyle: On Exhibit 3.

The Witness: Yes.

Mr. Boyle: I see no occasion to go further into it. We admit it.

By Mr. Mattimore:

Q. Now, Mr. Glendenning, you have prepared the distribution of those freight bills?

A. Yes, sir.

Q. And you have them in form so that they can be distributed if the Examiner finds it necessary?

A. Yes, sir.

Mr. Boyle: The same admission.

Exam. Peterson: If they admit it, it seems to be unnecessary.

By Mr. Mattimore:

Q. Now, Mr. Glendenning, when did you cease to operate those particular routes as reflected in Exhibit 3?

A. Well, for Swift & Company I ceased August 13, although we are still operating.

Q. You are still operating for Swift?

A. Not on those particular routes for Swift.

Q. I say you are still operating for Swift?

[fol. 495] A. Yes, we are still operating for Swift on other routes.

Q. But you ceased your operation for Swift into the particular territory referred to in exhibit 3 on August 13, 1937?

A. That is correct.

Q. What was the reason for that, do you know?
A. I would not know for sure.
Q. Has there been any complaint about your service?
A. Not that I know of.
Q. At that time you had on file with the Commission tariffs?
A. Yes, sir.
Q. Of your operation?
A. Yes, sir.

Mr. Mattimore: We have the tariffs here, if the Examiner please. If Mr. Boyle wants to admit the tariffs here, we have the tariffs under which he was operating at that time.

Mr. Boyle: I suggest that the Commission's record and accumulated files would show whether they are filed or not. Whether they are here would make no difference. You may give reference to them if you wish. They may be checked.

Exam. Peterson: The I. C. C. number?

Mr. Boyle: None of us can tell if they are on file.

Exam. Peterson: And the territory that they cover.

Mr. Boyle: But if it is just to prove that Glendenning Transfer had tariffs on file with the Commission naming the rates to these points, if that is what it is I am willing to concede it if that is all it is.

[fol. 496] Mr. Mattimore: That is the purpose.

Mr. Boyle: This is not a freight rate case. I understand we are not going into rates. If it is merely to show he had tariffs on file I am willing to admit it.

Exam. Peterson: I guess that is enough.

By Mr. Mattimore:

Q. After you ceased your operations or terminated your operations for Swift & Company to the points set out in the applicant's exhibit number 3, who took over that territory?
A. Let us clear this up. Understand, I am still operating into this territory.
Q. I mean for Swift & Company?
A. I am not handling Swift & Company's business.
Q. That is what I mean.
A. Noble took it over.
Q. Mr. Noble?
A. Yes.

Q. You are familiar with Mr. Noble's operations?

A. Yes, sir.

Q. He is handling the same territory that you were handling on that exhibit 3?

A. The same territory that I have handled approximately for six or seven years.

Q. That is the territory——

Mr. Boyle: That is the specific territory that you refer to here?

[fol. 497] Mr. Mattimore: In exhibit 3.

By Mr. Mattimore:

Q. Is there anything else, Mr. Glendenning that you had in mind?

A. Nothing that I can say, only that I am ready and willing to serve this same territory again if I am offered the business.

Mr. Boyle: I move that the answer be stricken as not relevant. As the Examiner said there is no testimony to be taken on convenience and necessity, which carries with it the willingness, and I only make it to preserve uniformity of the record. Frankly, I think it ought to go in.

Exam. Peterson: It is a little different. It is not with respect to convenience and necessity, but simply to show why he is not operating for Swift & Company at those points at the present time that he did not abandon it.

Mr. Boyle: I won't pursue the objection further. I merely wished to make it.

Exam. Peterson: Objection overruled.

Mr. Boyle: To indicate a possible tie up with this testimony that I attempted to get in.

Exam. Peterson: The Examiner holds there is no similarity.

Mr. Mattimore: You may examine.

Cross-examination.

By Mr. Boyle:

Q. Mr. Glendenning, when did the Interstate Commerce Commission approve your common carrier operation and grant you a certificate of convenience and necessity?

[fol. 498] A. It has not been approved as yet.

Q. Is it pending now?
A. Yes, sir.

Exam. Peterson: The purpose of introducing these exhibits is to show that he actually did operate there and you admit that he operated.

Mr. Boyle: I admit that.

Exam. Peterson: On, prior to June 1, 1935 and after that.

Mr. Boyle: I am not questioning it at all.

Exam. Peterson: Yes.

Mr. Boyle: I merely want to know whether he had a case pending with the Commission and the status has not yet been determined. That is the fact?

Mr. Mattimore: Yes.

Mr. Boyle: All right, I have no further questions.

Mr. Mattimore: That is all.

Exam. Peterson: Just a moment.

By Exam. Peterson:

Q. Mr. Glendenning, when did you first publish a tariff, the first one?

A. I have some copies of the tariff here that we have had prior, I think that was published in, July 26th, 1934. It shows most of those points in there, most of the points in question.

Q. Then, you have had supplements to these tariffs and then filed them in accordance with the Commission's requirements, also?

A. Yes. The tariff was filed with the I. C. C. May 4, 1936. [fol. 499] Q. I understand that the rates named in your tariff would apply to not only Swift & Company but to any other shippers that wanted to use the rates named in the tariff?

Mr. Boyle: That is a common carrier tariff.

The Witness: Yes. This tariff was passed out to the public.

By Exam. Peterson:

Q. You never had what you consider a contract with Swift & Company?

A. The only contract I had with Swift & Company was the same as Mr. Noble had in reference to assurance on the one and one half per cent reduction.

Q. Do you contend that your contract with Swift & Company is similar to exhibit number 1?

A. I just merely said that all that that contract means is that you allow them back one and one half per cent.

Mr. Fiddes: Just a minute. For the sake of the record I object to testimony concerning the meaning of exhibits or any contracts to Mr. Glendenning, the witness.

Mr. Boyle: That was an objection I was going to make myself.

Exam. Peterson: All right.

By Exam. Peterson:

Q. But you do not consider your contract with Swift & Company in the nature of a contract similar to what you might call a bilateral contract?

A. No.

[fol. 500] Q. You operated to these points daily or weekly?

A. Some of them were twice a week; others were three times a week; at some points, for instance, Eau Claire, La Crosse, Chippewa Falls over night.

Q. You operated in accordance with your fixed schedules, in accordance with the wishes of Swift & Company?

A. Yes, I did.

Redirect examination.

By Mr. Mattimore:

Q. Mr. Glendenning, in addition to the Swift business that you had at that time, as to these points in exhibit 3, were you also hauling other freight for other shippers?

A. Yes.

By Mr. Fiddes:

Q. You not only hauled for other shippers, Mr. Glendenning, but you hauled for shippers that were not packing companies, or anything like packing companies, did you not?

A. Yes, we did, not in the same truck. We handled that alone.

Q. As a common carrier you hauled that for anybody who offered business to you, did you not?

A. Yes, sir.

By Mr. Mattimore:

Q. You conducted a large business into that territory?
A. Yes, we did.
Q. So that Swift & Company was just one of your accounts?
A. That is right.

By Mr. Fiddes:

Q. I say when you hauled for anybody that offered it [fol. 501] to you, it was the fact, was it not, that you actually hauled for people who did offer enough shipments to you, which shipments had no similarity whatsoever to packing house products?
A. Yes, sir.
Q. But one of general commodity nature, all types of commodities?
A. Yes, we did.

By Exam. Peterson:

Q. You actually hauled shipments for other packing companies besides Swift & Company, did you, once in a while?
A. Well, we hauled quite a bit of packing house products for both Armour and Cudahy.

Exam. Peterson: Yes.

By Mr. Mattimore:

Q. Into that same territory?
A. Yes, sir.

Exam. Peterson: That is all.

Recross examination.

By Mr. Boyle:

Q. Were you hauling anything for Cudahy now?
A. Yes, we do.
Q. Into this same territory?
A. The same, yes, sir.
Q. Do I understand your testimony to be when you were handling this business for Swift & Company into this territory that the trucks handling that business were loaded exclusively with Swift & Company's products; that no other

[fol. 502] products of anybody were put into that truck while those shipments were in there until they were all discharged at their final destination?

A. I would say that would be the case of about ninety eight per cent of the time.

Q. The other two per cent might not be?

A. Once in a while we had some room and we would put in some other freight with them.

Q. Some other shippers?

A. Yes; but it would be from other packers.

Q. Did you ever have a truck carrying Swift & Company's products from South St. Paul into La Crosse in which a coffin was loaded?

A. Not that I know of.

Q. Never heard of that?

A. No, sir. That is a new one on me.

Mr. Mattimore: What difference would it make?

Mr. Boyle: I have no further questions.

Exam. Peterson: Mr. Boyle, where did you get the information? Who accused Mr. Glendenning of doing that?

Mr. Boyle: In the first place it is a proper question on cross-examination, and that counsel is not, I don't believe, subject to interrogation for the basis of his cross-examination. The witness may answer it as he sees fit. He has answered it and I am through with it.

Exam. Peterson: The witness is excused.

(Witness excused.)

[fol. 503] Mr. Boyle: Mr. Examiner, may we have a recess for about five minutes to determine whether or not we will have any rebuttal?

Exam. Peterson.

(A short recess was had.)

Mr. Boyle: I will call Mr. Logman, please.

F. F. Logman was sworn and testified as follows:

Direct examination.

By Mr. Boyle:

Q. Your full name, Mr. Logman?

A. F. F. Logman.

Q. You are in the transportation department of Swift & Company?

A. South St. Paul.

Q. South St. Paul?

A. Yes.

Q. What position?

A. Traffic Manager.

Q. Were you in that position on the first of August, 1937?

A. Yes, sir.

Q. You heard the testimony of Mr. Glendenning?

A. Yes, sir.

Q. Of the Glendenning Transfer Service. He has just testified.

A. Yes, sir.

Q. Will you state, or do you know the reason for the change on August 13, 1937, from the service that you were [fol. 504] receiving from the Glendenning Transfer Service?

A. I do.

Q. Will you state why Swift & Company made the change, the circumstances leading up to it, and any conversations that you may have had with Mr. Glendenning with respect to that?

Mr. Mattimore: Just a minute. That is objected to as irrelevant, immaterial and incompetent to the issues in this case. We are here to prove BMC-1. I do not know that any reason that this witness for Swift & Company might have would in any way affect this man's right on July 1, 1935.

Mr. Boyle: I call the Examiner's attention to the fact that counsel for Mr. Glendenning asked his witness if he knew of any reason for Swift & Company making a change. Mr. Glendenning didn't know of any. He wanted to know about the service. Mr. Glendenning said his services were quite satisfactory. He was ready and willing to go along when I called attention to, when I made a sort of a half objection, but the Examiner permitted it to go in. So the question has been raised here. The direct inference stands in this record that Glendenning was rendering this service to Swift & Company for a number of years to these points, and practically overnight without rhyme or reason Swift & Company took it away from him and gave it to Noble. I want this witness who had the talks with Mr. Glendenning and is familiar with all the circumstances leading up to that change to tell why it was. It is a direct issue that has

[fol. 505] been made here, not by me, not by the applicant, but by this protestant, Glendenning Transfer Service.

Mr. Mattimore: If there had been a reason given by Mr. Glendenning this would probably be proper rebuttal, provided it was germane to the case in the first instance. It is not. The answer of Mr. Glendenning was negative so there is nothing to prove.

Mr. Boyle: Mr. Glendenning's answer was he knew of no reason. Therefore he was deprived of his business without rhyme or reason. I want to show there was a reason.

Exam. Peterson: That is not the question for determination. The question for determination is whether the applicant was serving these points here or Glendenning was serving, or whether he was serving them at the time on July 1, 1935, or prior thereto, and whether the applicant had a territory; if not, the reason why he went in there without getting authority from the Commission, without filing an application.

Mr. Boyle: The Examiner's position here is that nothing that Glendenning did, no matter where he hauled or when, is irrelevant and has no bearing on this case.

Exam. Peterson: I will let the witness answer.

Mr. Boyle: I ask to move now that all the testimony of Mr. Glendenning be stricken from the record.

Exam. Peterson: No, that is not my business. Mr. Glendenning has testified he served those points, then he ceased [fol. 506] operations for Swift & Company at those points. Then Mr. Noble came in there. So I think you may ask the question that you started to.

Mr. Boyle: The question I am asking now is going into all the reasons leading up to this with the antecedents.

Exam. Peterson: It has no control or effect on the applicant's right to operate there.

Mr. Boyle: Has it any effect?

Exam. Peterson: No, I don't think it has any effect on it.

Mr. Boyle: Well, then, what is the opinion of the Examiner on the testimony given by the witness Glendenning, has it any place in this record?

Exam. Peterson: Only to show that he was serving that point and to show that.

Mr. Mattimore: Noble was not.

Exam. Peterson: Noble was not and to indicate that there wasn't any territory that Mr. Noble had at the time. That is clearly shown.

Mr. Boyle: Noble admitted on the stand that he was not serving those points at that time. There would be no purpose of the Glendenning testimony unless it was to show that Noble got in there and took the business away from Glendenning. That is the point I want to rebut.

Mr. Mattinmore: It is objected to as immaterial.

[fol. 507] Mr. Boyle: Is that not the purpose of the testimony of Mr. Glendenning?

Mr. Mattimore: It was not the purpose. The purpose of the testimony was, as I just stated, to show that he was operating in that territory on July 1 and prior thereto and after.

Mr. Boyle: What difference does it make on the rights of Noble?

Exam. Peterson: I think it makes some difference in considering whether the applicant had a territory.

Mr. Boyle: It is admitted that Noble was not operating in that territory.

Exam. Peterson: You have said that the applicant was not operating in that territory and did not have any territory there?

Mr. Boyle: It shows the particular points that Glendenning has spoken of as being serviced by him up to that point. The testimony of Noble shows he was not going in there.

Mr. Mattimore: So that he had no territory.

Mr. Boyle: He was going to all of the other territory.

Mr. Mattimore: After that he was going to such parts of the other territory as the documentary proof shows.

Mr. Boyle: If in the opinion of the Examiner, to go into all the reasons why Swift & Company changed its operation on August 13, 1937 from Glendenning to some one else, in this particular instance Noble, if it be not material, I have no [fol. 508] purpose with this witness. I move again that the testimony of Mr. Glendenning be stricken.

Exam. Peterson: The testimony of Mr. Glendenning with respect to any reasons for quitting, that should be stricken.

Mr. Mattimore: He did not give any.

Mr. Fiddes: His answer to that question may be stricken.

Exam. Peterson: Didn't you ask him a question?

Mr. Mattimore: I will withdraw the question, or I move that the question and answer be stricken.

Exam. Peterson: Very well.

Mr. Boyle: That does not take care of the situation. This is a cold record. In six months or a year from now, or in any court proceeding that may come out of this entire case, if this record be examined the person examining it will draw certain inferences from the testimony and one of those inferences may be that Noble is a usurper of this particular business and has taken it away from Glendenning, and I want to rebut that.

Mr. Fiddes: If that inference is drawn it is wholly immaterial in this case. You cannot use it for such purposes. I will take it you will grant it is immaterial?

Mr. Boyle: Absolutely.

Mr. Fiddes: If somebody is going to draw an immaterial inference you will have to use it for some other purpose than deciding this lawsuit.

Mr. Boyle: We will shorten this. I now make the formal [fol. 509] motion that all of the testimony of Mr. Glendenning be stricken from the record.

Exam. Peterson: The motion is denied.

Mr. Boyle: Exception. Now, I offer this witness to prove all of the circumstances leading up to the discontinuance of the arrangements between Swift & Company and Glendenning on August 13, 1937 to the territory about which Mr. Glendenning testified. I just make that offer of proof.

Mr. Fiddes: To that offer of proof goes the objection that was earlier mentioned.

Mr. Boyle: What is that?

Mr. Fiddes: To that offer of proof I renew the objection.

Exam. Peterson: You renew the objection?

Mr. Fiddes: To the offer of proof.

Exam. Peterson: Objection sustained.

Mr. Boyle: Exception. I further offer to prove by this witness ther. was dissatisfaction with the service. That was the reason for the change, that Mr. Glendenning was inclined to select his routes. There were various routes he did not want to handle. No satisfactory arrangement could be worked out of it.

Exam. Peterson: Is that true with respect to a contract carrier? A contract carrier will not move for a particular packing house a shipment of one hundred pounds any time

[fol. 510] the packing company wants to do it? He has to have a certain tonnage before he will make that route?

Mr. Boyle: A certain tonnage, under the Noble contract he has got to go wherever Swift & Company sends him in the territory.

Exam. Peterson: With one hundred pounds?

Mr. Boyle: No. There isn't any contract carrier that is going to make a contract to carry one hundred pounds.

Exam. Peterson: They have to have a certain tonnage before they will make the trip, is that correct?

Mr. Boyle: Surely. With that I have nothing further.

Exam. Peterson: Very well. That is all.

Mr. Mattimore: Did Mr. Logman testify as to when he took charge of the South St. Paul plant?

Mr. Boyle: Oh, I asked him if he had that position on August 1, 1937. He answered that he had.

Mr. Mattimore: May I ask one question?

Mr. Boyle: Mr. Logman's testimony has been excluded.

Mr. Mattimore: No, it has not been.

Exam. Peterson: Just with respect to certain phases of it. All of his testimony is not excluded.

Mr. Boyle: I have no objection to that.

Cross-examination.

By Mr. Mattimore:

Q. Mr. Logman, when did you take office at South St. Paul?

[fol. 511] A. The middle of July.

Q. In the capacity that you are now acting?

A. Correct.

Q. July, 1937?

A. Correct.

Q. Prior to that time where had you been?

A. For twelve years I assisted in the same capacity.

Q. No connections or supervision over the traffic out of South St. Paul?

A. If you will allow me to elaborate on that I can answer you, though not directly. I was not located here but during that period of 1933 I was assistant in charge of trucking operations with Swift & Company at Chicago for a period of over three months, a temporary position and while we were introducing this type of contract with them to the extending in the trucking business for the transportation of our products by truck?

Q. Other than that you had nothing to do with shipments out of South St. Paul?

A. I had some control of shipments that came into our territory while I was at Sioux City, over the Sioux City territory.

Q. Yes: That Sioux City territory has nothing to do with the territory referred to here in Applicant's Exhibit No. 3.

A. I believe that is Wisconsin.

Q. Yes.

A. No. We do not operate into Wisconsin from Sioux City.

[fol. 512] Mr. Mattimore: That is all.

Redirect examination.

By Mr. Boyle:

Q. You have all of your files and records here for a considerable period, antedating August 13, 1937 that you are taking from the direct files of your offices and the various memoranda therein contained, you have those with you?

A. I have those with me, subsequent to that time.

Q. And bearing upon this particular situation that we are discussing, the Glendenning arrangement?

A. Correct.

Mr. Boyle: That is all.

Exam. Peterson: Anything further?

(No response.)

Exam. Peterson: That is all.

(Witness excused.)

Exam. Peterson: The next witness.

Mr. Boyle: We have no more.

Exam. Peterson: Anything further?

Mr. Mattimore: We have nothing further.

Exam. Peterson: Briefs will be due November 10th.

Mr. Boyle: As I understand it all briefs are due at the same time and no replies?

Exam. Peterson: They have twenty days within which to file exceptions to the proposed report. If there is nothing further the hearing is closed.

(At 10:30 o'clock A. M. the hearing closed.)

(Here follows 1 photolithograph, side folio 513)

Plantiff's Exhibit "F".

Certificate Number 33049

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

FILED March 30 1917

THOMAS H. HOWARD, Clerk,

By Katherine O'Connor Deputy

To all to whom these Presents Shall Come, Greeting:

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true photostatic copy of the Certificate of Change of Objects of SWIFT AND COMPANY, filed January 6, 1917.

To all to whom these Presents Shall Come, Greeting:

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois do hereby certify that the following and hereto attached is a true photostatic copy of the Certificate of Change of Objects of SWIFT AND COMPANY, filed January 6, 1917,

the original of which is now on file and a matter of record in this office

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois.

Done at the City of Springfield this 16th day of March A.D. 1942.

Edward J. Hughes
SECRETARY OF STATE

513

8304

[fol. 514] [Stamp:] Paid Jan. 6, 1917. $1.00. B(?).

Certificate of Change of Objects of Swift and Company

We Hereby Certify, That at the regular annual meeting of the stockholders of Swift and Company, held at the office of the Company in the City of Chicago on the 4th day of January, 1917, pursuant to notice in the following manner, to-wit: By mailing to each of the stockholders of said corporation on the 1st day of December, A. D. 1916, a written notice properly addressed, stating the object of said meeting and the time and place, when and where it would be held, and also by general notice of the time, place and object of said meeting published for three (3) successive weeks in The Chicago Daily Law Bulletin, a newspaper published in Chicago, County of Cook, and State of Illinois, the first publication of which notice was on the 1st day of December, A. D. 1916, and the last publication on the 15th day of December, A. D. 1916, the following question was submitted to the stockholders for their action:

Resolved, That Section 2 of the Charter of Swift and Company, defining the objects for which said corporation was formed, be and the same is hereby changed and amended so as to make said Section 2 read as follows:

The object for which it is formed is (1) to manufacture, buy, sell and deal in and with any and all foods; (2) to manufacture (whether the resulting manufactured materials, articles, commodities or things be foods or not), buy, sell and deal in and with any and all materials, articles, commodities and things (a) which may be manufactured or converted into foods or the by-products thereof, or (b) which may be used in or in connection with the manufacture of, or the buying, selling, or dealing in and with foods, the by-products thereof, or the by-products of such materials, [fol. 515] articles, commodities or things. (3) The word "manufacture", wherever hereinbefore used, includes (but not by way of limitation), the slaughter of animals and the conversion thereof into meats and meat products;

which resolution was adopted by the stockholders, two-thirds of all the votes represented by the whole stock of said corporation being in favor of the adoption of said resolution and voting therefor.

Witness our hands and the seal of said corporation this 4th day of January, A. D. 1917.

L. F. Swift, President; F. G. Hayward, Secretary.

STATE OF ILLINOIS,
County of Cook, ss:

Louis F. Swift, being duly sworn, on oath says that he is the President of Swift and Company and that he has read the foregoing certificate and knows the contents thereof and that the facts therein stated and set forth are true.

L. F. Swift, President.

Subscribed and sworn to before me this 4th day of January, A. D. 1917. Robert E. Fisher, Notary Public.

MW/NA.

[fols. 516-517] 273—10930. Certificate of Change of Objects of Swift and Company. Filed Jan. 6, 1917. Louis E. Stevens, Sec'y of State.

[fol. 518] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

Civil No. 281

JOHN F. NOBLE, Doing Business as Noble Transit Company, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

OPINION—Filed July 24, 1942

Action by John F. Noble, doing business as Noble Transit Company, against the United States of America and the Interstate Commerce Commission to review and to annul certain restrictive provisions of an order of the Interstate Commerce Commission.

Complaint dismissed.

Mr. Charles A. Lethert and Mr. Frank H. Osterlind for the plaintiff.

Mr. Allen Crenshaw (Mr. Daniel W. Knowlton, Chief Counsel, on the brief) for the Interstate Commerce Commission.

Mr. S. R. Brittingham, Jr., Special Assistant to the Attorney General (Mr. Thurman Arnold, Assistant Attorney General, and Mr. Victor E. Anderson, United States Attorney, on the brief) for the United States.

[fol. 519] Mr. C. D. Todd, Jr., for the Contract Carrier Division of the American Trucking Associations, Inc., intervenor.

Mr. Perry R. Moore, of Messrs. Stinchfield, Mackall, Crounse & Moore for the Regular Common Carrier Conference of American Trucking Associations, Inc., Raymond Bros. Motor Transportation, Inc., Witte Transportation Company, and Steller Transportation Company, intervenors.

Mr. Franklin R. Overmyer filed brief for Illinois-Minnesota Motor Carriers' Conference, and American Trucking Association, Regular Common Carriers' Conference.

Messrs. Nicholson, Snyder, Chadwell & Fagerburg filed brief for Kraft Cheese Company.

Before Sanborn, Circuit Judge, and Nordbye and Bell, District Judges.

Bell, District Judge:

This is an action by John F. Noble, transacting business as the Noble Transit Company, to review and to annul certain restrictive provisions of an order of the Interstate Commerce Commission issued May 13, 1941, granting to the plaintiff a permit to operate as a contract carrier under the so-called "grandfather" clause of Section 209(a) of the Motor Carrier Act of 1935, as amended, 49 U. S. C. A. 309 (a). The cause was presented to a statutory court convened in accordance with the provisions of 28 U. S. C. A. 41, 43 and 48. The plaintiff, defendants and intervenors were represented by counsel at the hearing when the evidence taken before the Commission was introduced, together with all orders made and entered by the Commission in the matter; and the case, on stipulation of the parties in open court, was submitted for final determination and decree.

[fol. 520] The plaintiff began a motor carrier transportation business in September, 1934, when he obtained a com-

mon carrier permit from the state of Wisconsin for the transportation of general commodities between Chicago, St. Paul and Minneapolis. In November, 1934, he entered into a contract with Swift & Company for the carriage of merchandise for that company and its affiliates in the trade territory of its South St. Paul packing plant which required him to operate between points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota. Proper licenses and permits were issued by the various states for these operations. A similar contract was made by the plaintiff in February, 1935, with Libby, McNeil & Libby of Chicago and Blue Island, Illinois. Under these contracts the plaintiff carried merchandise for Swift and Libby, and under his common carrier permit he transported general commodities. The plaintiff June 1, 1935, made a contract with the Kraft Cheese Company for transportation of its products generally westward from Green Bay and Plymouth, Wisconsin, and northward from Chicago and Freeport, Illinois.

Subsequently to the dates mentioned the plaintiff claims to have made approximately 120 contracts with shippers for the transportation of property, more than 80 of which are still in existence. He has in operation 22 tractors, 22 trailers and 7 trucks. He has about 80 employees, and warehouse and terminal facilities in Minnesota, Wisconsin, Illinois and Iowa.

The plaintiff made timely application for a contract carrier permit. The findings of the Commission made by Division Five (28 M. C. C. 653) prescribe limitations that are [fol. 521] the subject of this controversy. These findings provide:

"Findings.—We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packinghouse products and supplies, from South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa

State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis., over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied.

"Upon compliance by applicant with the requirements of sections 215 and 218 of the act, with our rules and regulations thereunder, and with M. C. C. 628, an appropriate permit will be issued. An order will be entered, denying the application, except to the extent a permit is granted herein."

The Commission has limited the plaintiff to the transportation of "'fresh meats, canned foods, dairy products, and packinghouse products and supplies'' for "food canneries or meat-packing businesses'' within a designated area. The order specifies the class of property that may be transported and the class of shippers that may be served. The plaintiff, while conceding that the Commission may specify the classes of property that may be carried, contends that the Commission is without authority under the law to restrict the permit to certain designated classes of shippers and challenges such limitations on the ground that they are unlawful, arbitrary and not sustained by the evi- [fol. 522] dence. The defendants contend that the Commission has authority to specify not only the classes of property that may be carried but also the classes of shippers that may be served.

Therefore, the question presented is whether the Commission has statutory authority under the Motor Carrier Act to limit a contract carrier to the transportation of designated classes of property for specified classes of shippers.

With the development of the public highway system and the motor vehicle in the United States, the transportation of property by truck became a very considerable factor in the field of interstate commerce. The carrier by truck became a real competitor of the carrier by rail and water; consequently, Congress in 1935 added Part II, applicable to motor carriers to the Interstate Commerce Act, 49

U. S. C. A. 301, et seq. In 1940 Congress added the "National Transportation Policy."[1]

[fol. 523] The Interstate Commerce Act has been in the process of development for half a century. Long ago Congress recognized the imperative necessity of regulating the instrumentalities of commerce in the interest of the public welfare. It likewise recognized the impossibility of writing all the rules and regulations essential to effectuating its policy into statutory enactment; therefore, it embodied the foundation and ground-work in the Interstate Commerce Act, established the Interstate Commerce Commission and conferred upon it extensive powers to deal with the vast problems of transportation.

The Commission is authorized not only to administer the Act but also to interpret it, to hold hearings and to decide questions of fact of greatest importance. It is administrative and quasi-judicial in its functions, and is intended to have ample power to carry out the policy of Congress. Its decisions will not be disturbed by the courts unless they are unlawful or arbitrary, or unless a fair hearing was denied, or they are not supported by the evidence. It is composed

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[1] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, co-ordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (54 Stat. 899)

of experts whose interpretations are entitled to great weight. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 539; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. The Court will not substitute its wisdom for that of the Commission. *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, 481; *United States* v. *Carolina Freight Carriers Corporation*, 62 S. Ct. 722, 730. In the Carolina Freight Carriers case the Court said: "We express no opinion on the scope of the [fol. 524] certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. United States v. Maher, *supra*; Alton R. Co. v. United States, *supra*. Our task ends if the statutory standards have been properly applied." In the Manufacturers Railway case, the Court said: "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

The Act itself defines the powers and duties of the Commission pertaining to the question with which we are concerned. We thus approach a consideration of the statutory authority of the Commission under the Act. Section 209 (a) [2] of the Act denies the right of a contract carrier

[fol. 525] [2] "Sec. 209 (a). No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes

to engage in business in interstate commerce within the jurisdiction of the United States without a permit by the Commission, and it specifies the conditions that entitle a carrier to a permit.

[fol. 526] Section 209 (b) [3] outlines the procedure for acquiring the permit and what the permit shall contain. It

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or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * *"

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[3] "Sec. 209 (b). Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent au-

requires the carrier to show that he is able to render the service of a contract carrier, that he is willing to conform to the law and the lawful requirements of the Commission, and that the proposed operation will be consistent with the public interest and the declared policy of Congress; it further provides that "the Commission shall specify in the permit the business of the Contract Carrier covered thereby [fol. 527] and the scope thereof." Section 204 (a) (2) [4] provides that it shall be the duty of the Commission to regulate contract carriers by motor vehicle. Section 204 (a) (6) [5] provides that it is the duty of the Commission to administer, execute and enforce all the provisions of Part II

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thorized by the permit will be consistent with the public interest and the policy declared in section 202 (a) of this part; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

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[4] "Sec. 204 (a) (2). To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

[5] "Sec. 204 (a) (6). To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith and to prescribe rules, regulations, and procedure for such administration."

of the Act. Section 203 (a) (15) [6] defines a contract carrier, and Section 203 (a) (14) [7] defines a common carrier. In short, a contract carrier is one who engages in the transportation of property under individual contracts and is other than a common carrier.

[fol. 528] Authority is expressly vested in the Commission, as we have observed, to "specify in the permit the business of the contract carrier covered thereby and the scope thereof." This is a significant provision of the Act and its interpretation is decisive of the principal issue in this case. The permit constitutes the carrier's authority to do business and the specifications in the permit fix the limitations of the business; it may range from very limited to very extensive operations. The Act does not stop with conferring power to specify the business; it expressly adds the power to specify the scope of the business. There was a purpose in this additional provision. Manifestly, the intention was to vest in the Commission broad powers to determine and to specify in the permit, by the use of adequate language to do so, the extent of the operations in which the carrier might engage. The word "scope" is a comprehensive term as used in the Act and is for the purpose of enabling the Commission to prescribe a limited or an extensive range of operations in accordance with the rights of the carrier as determined by the character and

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[6] "Sec. 203 (a) (15). The term 'contract carrier by motor vehicle' means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation."

[7] "Sec. 203 (a) (14). The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

extent of the service furnished on July 1, 1935. The Commission has ample authority under the Act to designate the classes of shippers that may be served in addition to the classes of property that may be transported, in specifying the business and the scope thereof, if it is necessary or convenient to do so. The business of the shipper may be described in the permit if it thus can be made more accurately to define the limitations of the business of the carrier. The language of the Act is plain and simple. An application [fol. 529] for a permit could be made under the grandfather clause, a hearing held and the facts determined by the Commission. Authority was vested in the Commission to determine the character and extent of the service on the crucial date and to issue a permit in accordance therewith; and the power to specify the scope of the business meant the authority to define the extent of the operations that might be conducted under it. This means that the Commission could select the language and the method of specifying the scope of the business. Unless the Commission has such authority it cannot carry out the announced policy of Congress.

The Commission has been confronted with the question now before us. *T. B. Longshore, Contract Carrier Application*, 2 M. C. C. 480; *Keystone Transportation Company, Contract Carrier Application*, 19 M. C. C. 475; *John F. Noble, Contract Carrier Application*, 28 M. C. C. 653, the case under consideration. The argument has been made that the Commission in the Keystone case took a position inconsistent with its decision in the Longshore case, and that in this case it has followed the Keystone decision. In its report in this case the Commission said: "The question of the form of authority to be granted to contract carriers of retail food store commodities was considered at length in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, and the same problem with respect to defining the business of applicant and the scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications."

[fol. 530] In the Longshore case the carrier applied for a permit to transport steel products. Protestants agreed to withdraw opposition to the application on condition that the service of the applicant be limited to a designated com-

pany, the only one applicant had been serving. The Commission refused to name the company in the permit on the ground that it would prevent the addition or substitution of contracts as provided by law. The phrases "within the scope of the permit" were construed by the Commission to relate to the routes or territory which the carriers served and to the commodities which it was authorized to transport and not to the shipper. Obviously, the facts in that case were such as not to require a specification of the class of shippers, as a permit without such limitation would not enable the carrier under the circumstances to extend his operations to the transportation of general commodities for a large number of shippers.

In the Keystone case application was made to serve a chain wholesale and retail grocery and food business engaged in dealing in a great variety of commodities. The services of the carrier had been integrated with the business of the shipper so that it was rendering a highly specialized form of service. The appellant sought to have its business specified in terms of commodities, as in the Longshore case, but the Commission refused for the reason that merely naming the commodities that the carrier had been transporting in fact would impose no limitations whatever; consequently, the Commission found it necessary for effective regulation, in addition to specifying the commodities, [fol. 531] to designate the class of shippers that might be served.

The inherent nature of the business in the Longshore case constituted an effective restriction, while the same specification in the business in the Keystone case as that adopted in the Longshore case would have permitted the carrier to engage in the transportation of general commodities for all shippers. While the specification of the business in the Longshore case was suitable under the facts in that case, it did not meet the requirements of the Keystone case. In the Longshore case the Commission went as far as it needed to go under the circumstances while in the Keystone case it was required to impose an additional limitation to avoid authorizing the transportation of general commodities for all shippers. In the instant case the Commission undoubtedly followed its decision in the Keystone case because of the similarity of facts.

The plaintiff has not been injured by the interpretation of the Commission. On the crucial date, he had a contract with Swift, a meat-packing business, and with Libby, a food-canning business. On that date he had no other contracts under which he was engaged in actual operations. The plaintiff may continue operations under these contracts, and he may substitute or add other contracts for the transportation of similar property for food canners and meat packers in the territorial area covered by him on the crucial date. He can carry the classes of commodities specified for any food cannery or for any meat-packing business in the area. If the plaintiff can show that the public interest would be served by his operation as a contract carrier in other fields, he can obtain a permit for such operations. The defendants contend that the plaintiff, under the grand-[fol. 532] father clause and without proof of need of new operations, is seeking to extend his business beyond any rights intended to be conferred by the law. In a large measure this is true because of the great variety of products the plaintiff was carrying for Swift and for Libby. If the plaintiff is not limited to serving the classes of shippers with whom he had contracts on the crucial date he could engage in the transportation of an extensive list of goods, wares and merchandise for all shippers. The theory of the plaintiff may be illustrated, as follows: He hauled some paints, some articles of clothing and some hardware for Swift on the crucial date; therefore, he now has the right to haul paint for any paint manufacturer, clothing for any clothing merchant and hardware for any hardware dealer. Such elasticity is not contained in the grandfather clause and such a construction would prevent effective regulation of the transportation industry.

When the Motor Carrier Act was under consideration Congress obviously recognized that motor carriers throughout the country were serving shippers under individual contracts and were equipped in many instances to render a specialized service, and that the continuance of such arrangements was desirable for the benefit of both carriers and shippers; so, the grandfather clause was included in the Act. It was a saving clause designed to save to the contracting parties the carrier service then existing. The Act prescribes the conditions under which the carrier may

substitute or add contracts or add to his equipment and facilities. It must be when the proposed operation "will be consistent with the public interest" as provided by Section 209 (b), or "within the scope of the permit" in accord- [fol. 533] ance with the proviso which closes that section. The function of the Commission to determine the scope of the business is not limited by this proviso; indeed, it adds to the certainty of such power.

The briefs in this case contain extensive discussions of the rights of contract carriers versus common carriers. There should be no discrimination between carriers; one class should not receive special privileges in preference to another; one should not be allowed to profit at the expense of another; all should receive equal protection under the law and equal consideration in the process of regulation; and this very problem of fixing, maintaining and administering equal justice to all carriers is one of the chief objectives of the Interstate Commerce Act. Naturally, there is a clash when business interests come into competition; then the supervision and the authority of the Commission becomes useful. The welfare of the common carrier interests becomes involved in controversies such as this at the point where the Commission is required to consider the effect of its action on the transportation system as a whole. In the administration of the law, constant consideration must be given to the effect of every act of the Commission on all shippers and carriers. Accurate interpretation and effective regulation can result only from a broad perspective of the whole plan of carrier regulation and not from a view of the effect on affairs of one shipper or carrier.

A question is presented as to the validity of the claims based on the written contract made by the plaintiff on June 1, 1935, with the Kraft Company to transport its products. Operations were commenced under this contract in March, [fol. 534] 1936, westbound from certain points in Wisconsin and northbound from Chicago. Extensions of this service later were made to other points in Wisconsin, Minnesota and North Dakota. The Commission held that this was an unauthorized extension of service commenced after the grandfather date and was not within the scope of the permit. Section 209 (a) of the Act provides that an applicant is entitled to a permit covering operations on or before July 1, 1935, "if such carrier was in bona fide operation"

on that date and "has so operated since that time." Undoubtedly, the statute contemplated actual operations on the crucial date and the grandfather rights are measured by the character and extent of the service then being rendered.[8] Actual and substantial, rather than potential service, is essential under the law.[9] The proviso confers a special privilege and extends only to carriers plainly within its terms.[10] The execution of the written contract with Kraft is evidence of an intention to begin service, but it was nearly eight months before operations under it were commenced and that does not meet the requirements of the statute. If there had been any intention to recognize merely the existence of a contract as a basis for a permit Congress undoubtedly would have so provided. The decision of the Commission on this question must be sustained. [fol. 535] The validity of the order of the Commission designating territorial limits depends on whether it is supported by substantial evidence. The statute recognizes the right to a permit "over the route or routes or within the territory" for which application is made. The Commission is authorized to determine the area.[11] This is a question of fact and no showing has been made that the finding of the Commission is not sustained by the evidence.

We conclude that there was a fair hearing in this matter, that the findings of fact are supported by substantial evidence, and that the decision of the Commission is lawful and not arbitrary. Findings of fact, Conclusions of Law

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[8] *Alton Railroad Company v. United States*, 315 U. S. 15, 62 S. Ct. 432.

United States v. Maher, 307 U. S. 148.

United States v. Rosenblum Truck Lines, Inc., 62 S. Ct. 445, 315 U. S. 50.

[9] *McDonald v. Thompson*, 305 U. S. 263. *United States v. Carolina Freight Carriers Corporation*, 62 S. Ct. 722, 315 U. S. —.

[10] *Gregg Cartage & Storage Company v. United States*, 62 S. Ct. 932, — U. S. —.

[11] *Howard Hall Company, Inc. v. United States*, 62 S. Ct. 732. *United States v. Carolina Freight Carriers Corporation*, 62 S. Ct. 722.

and an Order for Judgment will be made and entered accordingly.

St. Paul, Minnesota, July 22, 1942.
John B. Sanborn, United States Circuit Judge.
Gunnar H. Nordbye, United States District Judge.
Robert C. Bell, United States District Judge.

[fol. 535a] [File endorsement omitted.]

[fol. 536] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

Findings of Fact and Conclusions of Law—Filed July 24, 1942

This cause came on to be heard before a statutory court consisting of John B. Sanborn, United States Circuit Judge, Gunnar H. Nordbye, United States District Judge, and Robert C. Bell, United States District Judge (28 U. S. C. A. 41, 43, 48), upon application of the plaintiff for a temporary injunction to restrain the enforcement of an order of the Interstate Commerce Commission granting to plaintiff a permit as a contract carrier under the so-called "grandfather" clause of Section 209 (a) of the Motor Carrier Act, 1935 (49 U. S. C. A. 309 (a)). The complaint alleges that the order is unlawful, as not being authorized by the statutes in respect to the limitation therein fixed, which authorizes a transportation service only to persons who operate food canneries and meat-packing businesses, and [fol. 537] in respect to the territorial limitations, it being contended that the record evidence does not provide substantial support for the order.

The Contract Carrier Division of the American Trucking Association and the Kraft-Phoenix Cheese Corporation intervened in support of plaintiff, and the Common Carrier Division of the American Trucking Association and the Trucking Association of Minnesota, Wisconsin and Dakotas, intervened in support of the defendants. Counsel representing plaintiff, defendants and interveners were present at the hearing, when evidence taken before the Commission

was introduced, together with all orders made and entered by the Commission. The case, upon stipulation of parties in open court, was submitted for final decree and determination.

The Court, being fully advised in the premises, and pursuant to Rule 52 of the Rules of Civil Procedure, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

Plaintiff is a resident of and maintains his principal place of business within the jurisdiction of this Court.

II

The plaintiff, John F. Noble, doing business as Noble Transit Company, filed with the Commission an application under the "grandfather" clause of Section 209 (a) of the Motor Carrier Act of 1935 (49 U. S. C. A. 309 (a)-, seeking, as amended, a permit authorizing continuance of operations as a contract carrier by motor vehicle in interstate or [fol. 538] foreign commerce, of general commodities, with certain exceptions, between specified points and areas in the states of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, over regular and irregular routes.

III

After hearing, the Commission found that the applicant was engaged in the business of a contract carrier by motor vehicle in interstate or foreign commerce on or prior to July 1, 1935, under individual contracts with persons (as defined in Section 203 (a) (1) of the Act, 49 U. S. C. A. 303 (a) (1) who operate food canneries or meat-packing businesses, in the transportation (a) of canned foods from Blue Island, Illinois, to St. Paul, South St. Paul, Minneapolis and Minnesota Transfer, Minnesota, (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies from South St. Paul to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa state lines near Dubuque, Iowa, to La Crosse, Wisconsin, and U. S. Highway 53 from La Crosse to Cameron, Wisconsin,

and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minnesota, and La Crosse, Wisconsin; over irregular routes, and granted to applicant a permit authorizing continuance of such operations. Plaintiff complains that the Commission has no statutory authority to specify in the "grandfather" permit granted, the business of the contract carrier and the scope thereof, as a transportation service for [fol. 539] persons who operate food canneries and meat-packing businesses and can only specify such business and the scope thereof as being the business of a contract carrier within a designated territory. Plaintiff also complains that the Commission order, in limiting the territory in which operations may be conducted, denies, without evidence support, some territory claimed as a "grandfather" right. Plaintiff also complains that the Commission order, in holding that the service to Kraft-Phoenix Cheese Corporation, under a written contract entered into on June 1, 1935, where no transportation was rendered until March 1936, was an unauthorized extension of operations, is without statutory authority, and that plaintiff had the right to so extend his operations under the provisions of Section 209 (a) (b); (49 U. S. C. A. 309 (a) (b).

IV

The plaintiff filed a petition for reconsideration by the Commission, which petition was denied.

V

At the hearing in this case plaintiff introduced in evidence a certified copy of the record before the Commission upon which the order under review was based.

Conclusions of Law

I

The Court has jurisdiction of the action herein.

II

The Commission report and order of May 13, 1941, were made after a full hearing.

III

The Findings of Fact upon which the order is based are [fol. 540] supported by substantial evidence.

IV

The Commission order is supported by the Findings of Fact.

V

The Commission's construction of the pertinent provisions of the Act is correct and the order is valid.

VI

The complaint should be, and hereby is, dismissed for want of equity.

St. Paul, Minnesota, July 22, 1942.

John B. Sanborn, United States Circuit Judge; Gunnar H. Nordbye, United States District Judge; Robert C. Bell, United States District Judge.

[fol. 540a] [File endorsement omitted.]

[fol. 541] In District Court of the United States for the District of Minnesota, Third Division

Civil No. 281

John F. Noble, Doing Business as Noble Transit Company, Plaintiff,

vs.

United States of America and Interstate Commerce Commission, Defendants

Order Dismissing Complaint—Filed July 24, 1942

The above entitled action came on for hearing on March 30-31, 1942, plaintiff and defendants being represented by counsel, and being submitted upon the pleadings, oral arguments and briefs of counsel, and the Court having entered

its Findings of Fact and Conclusions of Law deciding that the complaint herein should be dismissed, it is therefore

Ordered and Adjudged, That the complaint herein be, and the same hereby is, dismissed at the cost of plaintiff.

St. Paul, Minnesota, July 22, 1942.

John B. Sanborn, United States Circuit Judge.
Gunnar H. Nordbye, United States District Judge.
Robert C. Bell, United States District Judge.

[fol. 541a] [File endorsement omitted.]

[fol. 542] In District Court of the United States for the District of Minnesota, Third Division

[Title omitted]

Petition for Appeal—Filed August 10, 1942

To the Honorable Judges of the United States District Court for the District of Minnesota, Third Division:

John F. Noble, doing business as Noble Transit Company, plaintiff in the above entitled case, feeling himself aggrieved by the final decree entered by this Court on July 22nd, 1942, prays an appeal from said decree to the Supreme Court of the United States, in accordance with the statutory requirements.

The particulars wherein he considers the decree erroneous are set forth in the assignment of errors, accompanying this petition, and to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated August 5th, 1942.

Charles A. Lethert, 650 Endicott Building, St. Paul, Minnesota; Frank H. Osterlind, 206 Hodgson Building, Minneapolis, Minnesota, Attorneys for Plaintiff.

[fol. 543] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

ORDER OF COURT ALLOWING APPEAL—Filed August 10, 1942

In the above entitled cause, John F. Noble, doing business as Noble Transit Company, plaintiff, having made and filed his petition praying an appeal to the Supreme Court of the United States from the final decree of this Court, entered July 22nd, 1942, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

Ordered and Decreed that the appeal be, and the same is hereby allowed as prayed for.

Dated August 10, 1942.

By the Court:

John B. Sanborn, United States Circuit Judge.
Gunnar H. Nordbye, United States District Judge.
Robert C. Bell, United States District Judge.

[fol. 544] [File endorsement omitted.]

[fol. 545] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

ASSIGNMENTS OF ERROR—Filed August 10, 1942

In compliance with the rules of the Supreme Court of the United States, as amended, John F. Noble, doing business as Noble Transit Company, appellant, submits herewith his Assignments of Error, showing the basis of his appeal to the Supreme Court in the above entitled case on appeal:

1. The decision and order of the Court both deprives petitioner of his property without, and denies him, due process of law, and is in fact fatally repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the statute in that it is premised upon matter and information foreign to and outside of the record.

2. The decision and order of the Court practically and unlawfully restrict the petitioner to a one-way movement, confining his operation *to* points and places rather than between points and places, and definitely and unlawfully restrict the total trade area the petitioner contracted to serve and did serve under his bona fide Grandfather operation, under which the petitioner, as shown by the uncontradicted testimony in the case, entered into a contract with Swift and Company and Libby, McNeill and Libby and their subsidiaries and affiliates for the carriage of merchandise in their trade territory, which required him to operate *between* points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota, and that under these contracts, the petitioner carried merchandise for these business concerns, and under his common carrier permit he transported general commodities, which bona fide Grandfather operation the decision and order of the Court failed to recognize and affirm, and in fact denied.

[fol. 546] 3. The decision and order of the Court failed to recognize the fact, as shown by the record in evidence, that the petitioner was in bona fide Grandfather operation as a carrier by motor vehicle of general commodities, and that petitioner's contracts with Swift and Company, Libby, McNeill and Libby, and their subsidiaries and affiliates, and with Kraft-Phenix Cheese Corporation were incidental to its bona fide operation as a carrier of general commodities.

4. The decision and order of the Court erroneously and unlawfully recognize a power in the Interstate Commerce Commission to define the business of the carrier and the scope thereof by designating the business, or merely some part thereof, of the shipper for whom the petitioner may transport commodities, whereas the Grandfather Clause of the Motor Carrier Act of 1935 and its amendment and related provisions limit the power of the Commission to define the business of the carrier, under his Grandfather operation, by the commodities he carried and the territory he served.

5. The findings, conclusions and order of the Court are erroneously predicated upon the unlawful and arbitrary designation by the Commission of Swift and Company as merely a meat-packing concern and Libby, McNeill and

Libby as merely a food cannery, which unlawful and arbitrary designation in the disputed order of the Commission was not based by the Commission upon any findings of fact supporting that conclusion, is not sustained by the evidence, and the testimony definitely discloses that Swift and Company and Libby, McNeill and Libby and many of their subsidiaries and affiliates are general food products concerns.

6. The findings, conclusions and order of the Court erroneously and unlawfully restrict the liberal provisions of the Grandfather Clause and related provisions of the Act, by applying to and embodying in that clause the more restrictive provision as to procedure in Section 209 (b) of the Act in determining the Grandfather rights set forth in Section 209 (a) of the Act, and failed to interpret the meaning of the liberal language employed by Congress in defining, designating and determining Grandfather rights as distinguished from the rights of carriers who seek new or extension operations.

7. The findings, conclusions and order of the Court are erroneously predicated on the recognition of a power of the Commission, unwarranted by the clear language of the Act, to fail to include in plaintiff's bona fide Grandfather operation as a general contract carrier by motor vehicle his written contract with Kraft-Phenix Cheese Corporation, entered into prior to July 1, 1935, which failure is repugnant to and in conflict with the application of the plaintiff, in the alternative, for either a permit as a contract carrier or a certificate as a common carrier, and is in violation of [fol. 547] plaintiff's rights to either a permit or a certificate where the interruption of service is beyond control of applicant, under Section 209 (a) and 206 (a) of the Motor Carrier Act.

8. The findings, conclusions and order of the Court unlawfully restrict the right of the plaintiff to substitute or add contracts other than with packing-houses and food canneries, contrary to the proviso of Section 209 (b), of the Motor Carrier Act.

9. The findings, conclusions and order of the Court are erroneously and unlawfully premised on a narrow and restrictive interpretation of the Grandfather Clause and re-

lated provisions of the Motor Carrier Act, in that they restrict plaintiff's Grandfather rights to one of plaintiff's major operations, set forth, as directed, in his application, and fail to embrace in those rights plaintiff's entire bona fide Grandfather operation as contemplated by Congress and properly determined by a reasonable and liberal construction of the language of the Act.

10. The findings, conclusions and order of the Court, while recognizing the right of the Court to disturb the Commission's decision if a fair hearing was denied, failed to recognize the undisputed testimony and allegations that vital testimony as to the petitioner's Grandfather operations was arbitrarily excluded at the hearing by the Commission, and all exceptions and all and various timely appeals of the petitioner to the Commission for review, reconsideration and oral argument were denied by the Commission, and a fair hearing was thus denied to this plaintiff.

Dated August 5th, 1942.

Charles A. Lethert, 650 Endicott Building, St. Paul, Minnesota; Frank H. Osterlind, 206 Hodgson Building, Minneapolis, Minnesota, Attorneys for Plaintiff.

[fol. 548] [File endorsement omitted.]

[fol. 549] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

PETITION FOR ORDER STAYING FINAL DECREE PENDING APPEAL—Filed August 12, 1942

To the Honorable John B. Sanborn, United States Circuit Judge, Gunnar H. Nordbye and Robert C. Bell, United States District Judges:

John F. Noble, doing business as Noble Transit Company, plaintiff in the above entitled cause, respectfully moves that this Court enter an order staying the judgment or final decree entered in this cause, pending the determination of an appeal from said decree he proposes to take to

the Supreme Court of the United States, and shows as grounds therefor:

1. On July 22nd, 1942, this Court entered its final decree ordering and adjudging that the complaint of the plaintiff herein be and the same is dismissed at the cost of the plaintiff, and by its findings, in effect affirming an order of the Interstate Commerce Commission of May 13, 1941, restricting plaintiff's bona fide Grandfather operation, not only as to commodities and territory but as well by designating the only shippers or kinds of shippers the applicant may serve as a contract carrier by motor vehicle, for which said Grandfather operation the plaintiff had made timely application, in the alternative, to the Commission for a contract carrier permit or certificate for a common carrier, such application being designated by the Interstate Commerce Commission as Docket No. MC-70830 under Sections [fol. 550] 209 and 206 of the Motor Carrier Act of 1935, what is now by amendment of 1940 known as the Interstate Commerce Act.

2. The Interstate Commerce Commission has set the date of August 15th, 1942, as the date when said Order of the Commission shall become effective, and that thereafter, under said Order, plaintiff must cease to operate as a contract carrier by motor vehicle in interstate commerce, except as limited by the Order of the Commission.

3. Unless restrained by order of Court suspending the Commission's order, pending an appeal to and decision by the Supreme Court of the United States, the plaintiff will suffer irreparable loss and damage, regardless of what the Supreme Court of the United States may decide on an appeal of the above entitled matter, for the reason that pending the appeal, and before a decision is rendered by the Supreme Court of the United States, the plaintiff, if the effective date of the Order of the Interstate Commerce Commission is not continued, pending a final decision by the United States Supreme Court, will not be permitted to operate as a motor carrier in interstate commerce except within the very narrow and practically one-way movement restriction in the Order of the Commission, which the Supreme Court of the United States itself has held ruinous, and will therefore lose most of his business and ultimately lose his entire business, which he verily believes he will

never be able to recover if the effective date of the order be not stayed, pending the decision of the Supreme Court of the United States.

4. The Urgent Deficiencies Act of October 22nd, 1913, C. 32, 38 Stat. 210; 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III, not only provides for the issuance of a stay order of a Commission Order for the purpose of maintaining the *status quo* pending appeal, but makes the issuance of said stay order essential to the maintenance of the *status quo* pending appeal. *Scripps-Howard Radio Inc. v. Federal Communications Commission*, 62 *Sup. Ct. Rep.*, 875.

Wherefore plaintiff prays that this Court enter an Order staying, pending the appeal to, and determination by the Supreme Court of the United States, the final decree entered in this cause on July 22, 1942, and restraining and preventing the defendant, Interstate Commerce Commission, from putting into effect its Order in the above entitled matter effective August 15, 1942, or otherwise changing the [fol. 551] *status quo* of the plaintiff during the pendency and decision of the appeal before the Supreme Court.

Dated this 8th day of August, 1942.

Charles A. Lethert, 650 Endicott Building, St. Paul, Minnesota; Frank H. Osterlind, 206 Hodgson Building, Minneapolis, Minnesota, Attorneys for Plaintiff.

Copy of petition for order staying the Order of the Interstate Commerce Commission effective August 15, 1942, acknowledged August —, 1942.

For the United States of America: —— ——, United States District Attorney; —— ——, Assistant Attorney General; —— ——, Special Assistant to the Attorney General. For the Interstate Commerce Commission: —— ——, General Counsel; —— ——, Assistant General Counsel. For Intervenors: C. D. Todd, Jr., For Contract Carrier Division of American Trucking Assoc., Inc.; Perry R. Moore, For the Regular Common Carrier Conference of American Trucking Assoc., Inc. et al.; Franklin R. Overmyer, For Ill.-Minn. Motor Carriers Conference, et al.; D. F. Fagerburg, For Kraft Cheese Company.

[fol. 552] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

ORDER STAYING EFFECTIVE DATE OF ORDER OF INTERSTATE COMMERCE COMMISSION—Filed August 12, 1942

A petition having been made and filed herein for an Order suspending the enforcement of an Order made by the Interstate Commerce Commission, effective August 15, 1942, pending an appeal by the appellant to the United States Supreme Court.

It Is Hereby Ordered: that the order of the Interstate Commerce Commission is hereby suspended, pending an appeal to the United States Supreme Court, and until the determination thereof.

John B. Sanborn, United States Circuit Judge; Gunnar H. Nordbye, United States District Judge; Robert C. Bell, United States District Judge.

Dated August 12, 1942.

[fol. 553] [File endorsement omitted.]

[fols. 554-555] Citation in usual form, filed Aug. 14, 1942, omitted in printing.

[fol. 556] [File endorsement omitted.]

[fol. 557] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

NOTICE TO THE ATTORNEY GENERAL OF THE STATE OF MINNESOTA—Filed August 14, 1942

To the Honorable J. A. A. Burnquist, Attorney General of the State of Minnesota:

Pursuant to the Urgent Deficiencies Act of October 22nd, 1913, 38 Stat. L. 221, you are hereby notified that John F. Noble, doing business as Noble Transit Company, plaintiff in the above entitled cause, has taken an appeal to the Su-

preme Court of the United States from the final decree of the United States District Court for the District of Minnesota, Third Division, entered July 22nd, 1942, and the Order allowing the appeal makes the same returnable within forty days from the date thereof.

Dated August 5th, 1942.

Charles A. Lethert, 650 Endicott Building, St. Paul, Minnesota; Frank H. Osterlind, 206 Hodgson Building, Minneapolis, Minnesota, Attorneys for Plaintiff.

[fol. 558] [File endorsement omitted.]

[fols. 559-560] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 561] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

Docket No. 511

REQUEST TO PREPARE AND PRINT RECORD AND STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL BY APPELLANT—Filed November 4, 1942

To the Clerk of the Supreme Court of the United States:

SIR:

The undersigned hereby respectfully requests that you print the following record in conformity with the rules of the Court, and that said record shall include the following:

1) Appellant's petition and order for Hearing in the United States District Court, District of Minnesota, Third Division, and Exhibits "A", "B" and "C", attached to said petition.

2) Answer of the United States of America.

3) Answer of the Interstate Commerce Commission.

4) Transcript of Stenographer's notes of hearing held at St. Paul, Minnesota, September 21, 22 and 23, 1938, before C. J. Peterson, Examiner, excluding, however, exhibits

therein referred to (of which certified photostatic copies are part of the certified transcript of the record before the Supreme Court).

5) Plaintiff's Exhibit F, in United States District Court, being Articles of Incorporation of Swift and Company.

6) Opinion, Findings of Fact, Conclusions of Law and Decree of the said United States District Court for the District of Minnesota.

7) Notice of Appeal, Notice of Motion and Petition of Appellant for Appeal, and Stay Pending Appeal, and Order of Court thereon.

8) Statement as to Jurisdiction on Appeal.

[fol. 562] 9) Assignments of Error.

10) Citation.

11) Notice to the Attorney General of the State of Minnesota.

12) Appellees' Motion to Affirm.

You are further requested to print in said record the following points, which are relied upon by the appellant as a basis for his appeal:

(1) The decree of the District Court denies appellant, and deprives him of his property, without due process of law, and is fatally repugnant to, and in conflict with, the Fifth Amendment to the Constitution of the United States and the statute, in that it is premised upon matter and information foreign to and outside of the record.

(2) The limitations imposed by the Commission, and upheld by the decree of the Court, in its Order authorizing the issuance of a permit to appellant under the provisions of Sec. 209 of Part 2 of the Interstate Commerce Act, conflict with the terms of the Act and the policy of Congress in its enactment.

(3) The Commission's interpretation, upheld by the decree of the Court, of Sec. 209 of Part 2 of the Interstate Commerce Act in this proceeding, renders questionable the constitutionality of said section, and should therefore be rejected.

(4) The conclusions of the District Court, to wit: "that the Commission's construction of the pertinent provisions of the Act is correct and the order is valid," (Rec. Doc. No. 8, p. 5), and the Court's order based on said conclusions, are contrary to the clear provision, applicable to "grandfather" permits, of Sections 203 (a) (15), 209 (a) and 209 (b) of Part 2 of the Interstate Commerce Act, in that they vest in the Interstate Commerce Commission the unlimited and arbitrary power, in determining the business of the carrier and the scope thereof in any case, to not only restrict and classify the commodities the carrier may transport and specify the territory he may serve, which the Commission itself held in the *Longshore Contract Carrier Application Case*, 2 M. C. C., 480, during four years of operation under the Act, to be the absolute limit of its power under the Act in that respect, but also to restrict the carrier's operation to certain shippers or classes of shippers, which additional power the Commission first assumed, for the special protection of common carriers as it indicated, in *Keystone Transportation Company Contract Carrier Application*, 19 M. C., 475, never reviewed by this Court nor, to appellant's knowledge and belief, by any district court other than the Court from whose decree this appeal is taken. (Rec. Doc. No. 7, p. 12).

(5) The conclusions and decree of the District Court are further contrary to the provisions of the Interstate Commerce Act, Part 2, not only in attributing to the Commission the aforesaid unlimited and arbitrary power to designate the shipper or classes of shippers the carrier may serve, but in clothing the Commission with the further power, in making such designation and classification, to limit the scope of the shipper's business to a major product in which he deals, or to some special branch of his business, in the face of the undisputed evidence and the [fol. 563] Court's findings, that appellant's "grandfather" operation, by written contract with the shippers and their subsidiaries, encompassed *all* of the articles, products, and commodities produced, manufactured, used and sold by the shippers and their subsidiaries; (Rec. Doc. No. 7, p. 3, Doc. No. 5a), and the Commission's order and the decree of the Court are contrary to law in that, without any findings as to the true business of the shipper, and contrary to the evidence, they restrict appellant's operation to canned

foods for food canneries and to fresh meats, canned foods, dairy products, and packing house products and supplies for meat packing businesses, when in truth and in fact, as the evidence disclosed, the shippers and their subsidiaries designated by the Commission are for the most part general food products concerns, and the chief shipper's business, that of Swift and Company, is officially operating, and has operated since 1917, under its Articles of Incorporation as a general food products concern, (Plaintiff's Exhibit F in U. S. Dist. Court).

(6) The Commission's order and the decree of the Court are erroneously predicated upon a similarity of appellant's "grandfather" operation to the operation of the carriers in the Keystone Case, supra, (Rec. No. 2, Exhibit A, Sheets 11 and 12), whereas the evidence in appellant's case and the findings of the Commission and the Court indicate clearly the analogy of appellant's operation with the Longshore Case, supra, (Record, Doc. No. 5, and Doc. No. 7, p. 3), and the reasoning in the Keystone Case should not have been followed in this proceeding.

(7) The Commission's order and the decree of the District Court in restricting appellant's operation to certain designated shippers or classes of shippers, are erroneously predicated on certain "individual operations" engaged in by appellant under his bona fide "grandfather" operation, (Rec. Doc. No. 7, p. 11), whereas the term "individual operations" which was originally in Sec. 209 (b) of the Bill before Congress for enactment of the Motor Carrier Act, was purposely stricken therefrom by Congress, and the phrase "business of the carrier", namely, carriers of passengers or carriers of property, and regular route carriers or irregular route carriers, as defined in Sec. 203 (a) of the Act, was substituted with the clear and unmistakable intent that the carrier's prior "individual operations" should definitely not be the gauge or standard of authority granted him, but the gauge and standard prescribed by Congress in its aforesaid definition of the business of the carrier and the scope thereof should apply (79 Cong. Rec., 5654).

(8) The Order of the Commission and the decree of the Court are erroneous in that they are predicated upon alleged *special* or *specialized* service of appellant to particu-

lar shippers, whereas the Amendment of 1940 of the Act, Sec. 203 (a) deleted the word "special" with reference to a contract carrier's contracts, and thus declares him to be in bona fide "grandfather" operation under individual contracts without special or specialized service to particular shippers.

(9) The decree of the Court erroneously holds the word "scope" of the business of the carrier to be a term of limitation and restriction, as used in Sec. 209 (b) of the Act and applied to a "grandfather" operation, (Rec., Doc. No. 7, p. 11), whereas the word scope, in its ordinary sense is an all-comprehensive term, meaning, "amplitude of opportunity"; "free course or vent"; "range"; "length"; "extent", and "sweep"; and therefore the entire range, length, extent, sweep and amplitude of opportunity of appellant's business should have been the basis for the authority granted appellant to continue his bona fide operations; and if the reasoning that a designation or classification of the shippers in determining the scope of the carrier's business, is correct, then the entire scope of the shipper's business, the extent thereof and the sweep thereof should have been embraced in the term "scope", and the shipper's business is not to be restricted to a major product in which he deals or a special branch of his business, where [fol. 564] the carrier's "grandfather" operation encompassed the transportation of all of the articles, products and commodities manufactured, produced, used, dealt in or sold by the shippers and their subsidiaries.

(10) The Commission's order and the decree of the Court erroneously exclude from appellant's bona fide "grandfather" operation his written contract with Kraft-Phenix Cheese Corporation, entered into prior to July 1, 1935, on the ground that the operation did not commence until after that date, whereas the interruption of the service was beyond the control of the carrier by reason of the shipper's inaugurating a new method in distribution, and which interruption of service entitles the carrier to a permit or certificate for the continuance of said operation. (Rec. Doc. No. 7, pp. 16 and 17.)

(11) The Commission's Order and the decree of the Court restrict appellant to an operation *to* points and places rather than *between* points and places and thus limits him

practically to a one-way movement, whereas the evidence disclosed and the findings of both the Commission and the Court definitely set forth that appellant operated *between* points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota (Rec. Doc. No. 7, p. 3).

(12) The Order of the Commission and the decree of the Court, and the latter contrary to its own findings (Rec. Doc. No. 7, p. 3), failed to recognize the fact that appellant was in bona fide "grandfather" operation as a carrier by motor vehicle of general commodities and that his contract with Swift and Company, Libby, McNeill and Libby and their subsidiaries and affiliates and with Kraft-Phenix Cheese Corporation were part of his bona fide operation as both a regular contract carrier and an irregular carrier of general commodities.

(13) The Order of the Commission and the decree of the Court erroneously and unlawfully restrict the right of the appellant to substitute or add contracts under his bona fide operation other than with packing houses and food canneries, contrary to the proviso of Sec. 209 (b) of the Interstate Commerce Act, Part II.

(14) The Order of the Commission and the decree of the Court are erroneously based upon the application of the more restrictive provisions as to procedure in Sec. 209 (b) of the Act, applicable to permits for carriers who seek new and extension operations (Rec. Doc. No. 7, pp. 8-10), rather than on the more liberal provisions of Sec. 209 (a) of the Act especially applicable to "grandfather" operators.

(15) The Order of the Commission was made without a fair hearing of appellant's case, and the decree of the Court, while recognizing the right of the Court to disturb the Commission's decision if a fair hearing was denied, failed to consider the facts, as disclosed by the record, that vital testimony as to appellant's "grandfather" operation was arbitrarily excluded at the hearing by the Commission, and that all exceptions and all and various timely appeals of appellant to the Commission for review, reconsideration and oral argument, even as to a proper designation of the business of the shipper, were denied by the Commission (Rec. Doc. No. 7, p. 18 and Doc. No. 8, p. 4).

(16) The conclusion of the Court and the decree based thereon are erroneous in holding that the appellant has not

been injured by the interpretation of the Commission, (Rec. Doc. No. 7, p. 14). It is plain that the restriction, forced upon appellant by the Order of the Commission and the decree of the Court, of appellant's "grandfather" operation to a mere semblance of his former and present operation and prior opportunity will materially impair [fols. 565-566] and curtail his substantial rights, destroy his large investments, necessitate the discharge of many employees, and make it impossible for him to operate economically or successfully.

Dated this thirty-first day of October, 1942.

Charles A. Lethert, 650 Endicott Building, St. Paul, Minnesota; Frank H. Osterlind, 206 Hodgson Building, Minneapolis, Minnesota, Attorneys for Appellant.

[fol. 567] CERTIFICATE OF SERVICE OF APPELLANT'S REQUEST TO PREPARE AND PRINT RECORD AND STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

I, Charles A. Lethert, attorney for plaintiff-appellant, hereby certify that, on the 2nd day of November, 1942, I served appellant's Request to Prepare and Print Record and Statement of Points to be Relied Upon on Appeal on all the parties in interest in the above matter, as listed below, by mailing, by registered mail, with a return receipt requested, a true copy of said Document to them and each of them at their respective and last known addresses given:

Victor E. Anderson, United States Attorney, District of Minnesota, St. Paul, Minnesota.

The Attorney General of the United States, Department of Justice, Washington, D. C.

Smith R. Brittingham, Jr., or his successor, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

[fols. 568-569] Interstate Commerce Commission, W. P. Bartel, Secretary, Washington, D. C.

Daniel W. Knowlton and Allen Crenshaw, General Counsel and Assistant General Counsel, Interstate Commerce Commission, Washington, D. C.

W. E. Hustleby, District Director, Interstate Commerce Commission, Minneapolis, Minnesota.

C. D. Todd, Jr., Attorney for Intervenor, Contract Carrier Division, American Trucking Assoc., Inc., 1423 16th Street Northwest, Washington, D. C.

D. F. Fagerburg, Nicholson, Snyder, Chadwell and Fagerburg, Attorneys for Intervenor, Kraft Cheese Company, 135 South LaSalle Street, Chicago, Illinois.

Perry R. Moore, Attorney for Intervenor, Common Carrier Division, American Trucking Assoc., Inc., 1100 First National-Soo Line Building, Minneapolis, Minnesota.

Franklin R. Overmyer, Attorney for Intervenors, Common Carrier Division, American Trucking Assoc., Inc., and Illinois-Minnesota Motor Carriers Conference, 111 West Monroe Street, Chicago, Illinois.

The Attorney General of the State of Minnesota, State Capitol, St. Paul, Minnesota.

Charles A. Lethert, Attorney for Plaintiff-Appellant.

Dated this 2nd day of November, 1942.

[fol. 570] [File endorsement omitted.]

[fol. 571] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 511

ORDER NOTING PROBABLE JURISDICTION—December 7, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47012. Minnesota, D. C. U. S. Term No. 511. John W. Noble, Doing Business as Noble Transit Company, Appellant, vs. The United States of America, Interstate Commerce Commission, et al. Filed November 4, 1942. Term No. 511 O. T. 1942.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 511

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

STATEMENT AS TO JURISDICTION.

CHARLES A. LETHERT,
FRANK H. OSTERLIND,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Date of the decree and petition for appeal	2
Nature of the case	2
Cases believed to sustain jurisdiction	5
Appendix "A"—Opinion of the District Court	7
Appendix "B"—Findings of fact and conclusions of law of District Court	20
Appendix "C"—Order dismissing complaint	24

Table of Cases Cited.

Howard Hall Co., Inc. v. *U. S.*, 62 Sup. Ct. 732	6
Interstate Commerce Commission v. *Southern Pacific*, 200 U. S. 536	6
United States v. *Carolina Freight Carriers Corporation*, 62 Sup. Ct. 722	5
United States v. *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*, 282 U. S. 311	6
United States v. *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*, 51 Sup. Ct. 159	6
United States v. *Maher*, 307 U. S. 148	6
United States v. *Rosenbloom*, 62 Sup. Ct. 445	5

Statutes Cited.

Commerce Court Act (c. 309, 36 Stat. 539, 28 U. S. C. 45a)	1
Constitution of the United States, Fifth Amendment	2
Judicial Code, Section 238, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. d; 28 U. S. C. 345)	2
Motor Carrier Act of 1935:	
Section 206a	5
Section 209a	4, 5
Section 209b	4
Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 210, 219; 28 U. S. C., Secs. 45 and 47a	2

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

CIVIL ACTION No. 281

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

STATEMENT AS TO JURISDICTION ON APPEAL.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, John F. Noble, doing business as Noble Transit Company, appellant, submits herewith his statement showing the basis of the jurisdiction of the Supreme Court of the above entitled case on appeal.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. 111, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (d); U. S. Code, Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

B. The final decree sought to be reviewed was entered July 22nd, 1942. The petition for appeal was filed and the Order allowing the appeal was entered August 10, 1942.

C. Plaintiff, a contract carrier by motor vehicle, subject to the Motor Carrier Act of 1935 and to the jurisdiction of the Interstate Commerce Commission thereunder, brings this suit to set aside the Commission's order of May 13, 1941, effective August 15, 1942, which partially denied plaintiff the right, under the Grandfather Clause of said Act, to operate as a contract carrier, or in the alternative, a common carrier, or otherwise, as applied for before the Interstate Commerce Commission under the application designated as MC-70830.

After said denial by the Interstate Commerce Commission of the application of the plaintiff, the plaintiff filed a suit in the United States District Court for the District of Minnesota on the eighth day of November, 1941, praying that the court suspend, annul and enjoin the Commission's Order of May 13th, 1941, on the principal grounds that:

1. The Order of the Commission both depriyes petitioner of his property without, and denies him, due process of law, and is fatally repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the statute, in that it is premised upon matter and information foreign to and outside of the record.

2. The Order of the Commission unlawfully and arbitrarily construes the words and terms "bona fide", "business" and "scope" as employed in the Motor Carrier Act of 1935, amended in 1940 as the Interstate Commerce Act, Part 2, in determining plaintiff's bona fide Grandfather operation, and his business and the scope thereof.

3. The finding by the Commission that petitioner shall be limited to contract carrier service for certain designated shippers or types of shippers only is arbitrary, is unlawful, and contrary to the intent of Congress, and no provision of the Act warrants such limitation.

4. The conclusion that Swift and Company is merely a meat-packing concern and Libby, McNeill and Libby merely a food cannery is an arbitrary and unlawful designation of the shipper, and not based or predicated upon any findings by the Commission as to the actual general business of the shippers, that of food products.

5. The Order of the Commission erroneously defines the term "contract carrier by motor vehicle" and limits the scope thereof, contrary to the purpose of the Act and the intent of Congress in its passage.

6. The Order of the Commission arbitrarily and unlawfully discriminates against the plaintiff as a contract carrier by motor vehicle, and deprives him of the equal protection of the law provided for by Congress for both contract carriers and common carriers in the Motor Carrier Act and its amendment.

7. The said Order of the Commission contravenes the policy of the National Transportation Policy as declared by Congress in said Act in that it denies to plaintiff fair and impartial regulation as a contract

carrier, fails to recognize and preserve the inherent advantages of contract carriage and improvidently and unlawfully curtails and restricts the development of contract carriage as a legitimate business in the coordination and preservation of the national transportation system by highway.

8. The findings of the Commission fail to properly interpret the Grandfather Clause of the Motor Carrier Act contained in Section 209 (a) and erroneously apply the procedure for new and extension operations contained in Section 209 (b) of the Act to Grandfather applications, whereas the procedure for the latter is clearly described in Section 209 (a).

9. The Order of the Commission was not predicated upon a fair hearing to the plaintiff on his Grandfather application in that vital testimony was arbitrarily excluded at the hearing and any and all exceptions by the plaintiff and petitions for review, reconsideration and oral argument were denied him.

10. The Order of the Commission is in substance and effect arbitrary, and unlawfully restricts the right of the plaintiff to substitute or add contracts other than with packing houses and food canneries, contrary to the proviso, Section 209 (b), of the Motor Carrier Act.

11. The Order of the Commission is void as being premised upon conditions wholly inadequate in law to support it.

12. The Order of the Commission unlawfully failed to include in plaintiff's bona fide Grandfather operation his written contract with Kraft-Phenix Cheese Corporation made prior to July 1, 1935, which failure is repugnant to and in conflict with the application of the plaintiff, in the alternative, for either a permit as a

contract carrier or a certificate as a common carrier, and is in violation of plaintiff's rights to either a permit or a certificate where the interruption of service is beyond control of applicant, under Section 209 (a) and 206 (a) of the Motor Carrier Act.

13. The Order and the Commission's ultimate conclusions are both without factual integrity and neither is sustained by the primary findings of fact made by the Commission.

14. The Order is contrary to the law and evidence in that the Commission failed to heed and recognize affirmative statutory mandates, and made its Order upon standards of its own, rather than on the clear and definite standards prescribed by Congress.

15. The answers of the United States of America and the Interstate Commerce Commission denied the material allegations of the complaint.

16. Final hearing was held before the statutory court of three judges on the thirtieth and thirty-first days of March, 1942, and Findings of Fact, Conclusions of Law and Final Decree were filed on the twenty-second day of July, 1942, holding the Commission's Order valid, dismissing plaintiff's complaint, and denying to plaintiff the relief sought.

D. The questions presented are substantial and of public importance.

E. The following cases sustain the jurisdiction of the Supreme Court to review the decree of the District Court:

U. S. v. *N. E. Rosenbloom*, Vol. 62, No. 6, Sup. Ct. Rep., Page 445;

U. S. v. *Carolina Freight Carriers Corporation*, Vol. 62, No. 9, Sup. Ct. Rep., Page 722;

Howard Hall Company, Inc. v. *U. S.*, Vol. 62, No. 9, Sup. Ct. Rep., Page 732;

U. S. v. *Maher*, 307 U. S. 148;

U. S. v. *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*, 282 U. S. 311;

Interstate Commerce Commission v. *Southern Pacific*, 200 U. S. 536;

U. S. v. *Chicago, Milwaukee and St. Paul R. R. Co.*, Vol. 51, No. 5, Sup. Ct. Rep., Page 159.

Copy of the findings of fact, conclusions of law and final decree entered by the District Court are appended hereto.

Dated August 5th, 1942.

CHARLES A. LETHERT,
650 Endicott Building,
St. Paul, Minnesota;
FRANK H. OSTERLIND,
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Minneapolis, Minnesota,
Attorneys for Plaintiff.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

Civil No. 281.

JOHN F. NOBLE, Doing Business as Noble Transit Company, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Action by John F. Noble, doing business as Noble Transit Company, against the United States of America and the Interstate Commerce Commission to review and to annul certain restrictive provisions of an order of the Interstate Commerce Commission.

Complaint dismissed.

Mr. Charles A. Lethert and Mr. Frank H. Osterlind for the plaintiff.

Mr. Allen Crenshaw (Mr. Daniel W. Knowlton, Chief Counsel, on the brief) for the Interstate Commerce Commission.

Mr. S. R. Brittingham, Jr., Special Assistant to the Attorney General (Mr. Thurman Arnold, Assistant Attorney General, and Mr. Victor E. Anderson, United States Attorney, on the brief) for the United States.

Mr. C. D. Todd, Jr. for the Contract Carrier Division of the American Trucking Associations, Inc., Intervenor.

Mr. Perry R. Moore of Messrs. Stinchfield, Mackall, Crounse & Moore for the Regular Common Carrier Conference of American Trucking Associations, Inc., Raymond Bros. Motor Transportation, Inc., Witte Transportation Company, and Steller Transportation Company, intervenors.

Mr. Franklin R. Overmyer filed brief for Illinois-Minnesota Motor Carriers' Conference, and American Truck-

ing Association, Regular Common Carriers' Conference.

Messrs. Nicholson, Snyder, Chadwell & Fagerburg filed brief for Kraft Cheese Company.

Before Sanborn, Circuit Judge, and Nordbye and Bell, District Judges.

BELL, *District Judge.*

This is an action by John F. Noble, transacting business as the Noble Transit Company, to review and to annul certain restrictive provisions of an order of the Interstate Commerce Commission issued May 13, 1941, granting to the plaintiff a permit to operate as a contract carrier under the so called "grandfather" clause of Section 209 (a) of the Motor Carrier Act of 1935, as amended, 49 U. S. C. A. 309 (a). The cause was presented to a statutory court convened in accordance with the provisions of 28 U. S. C. A. 41, 43 and 48. The plaintiff, defendants and intervenors were represented by counsel at the hearing when the evidence taken before the Commission was introduced, together with all orders made and entered by the Commission in the matter; and the case, on stipulation of the parties in open court, was submitted for final determination and decree.

The plaintiff began a motor carrier transportation business in September, 1934, when he obtained a common carrier permit from the state of Wisconsin for the transportation of general commodities between Chicago, St. Paul and Minneapolis. In November, 1934, he entered into a contract with Swift & Company for the carriage of merchandise for that company and its affiliates in the trade territory of its South St. Paul packing plant which required him to operate between points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota. Proper licenses and permits were issued by the various states for these operations. A similar contract was made by the plaintiff in February, 1935, with Libby, McNeill & Libby of Chicago and Blue Island, Illinois. Under these contracts the plaintiff carried merchandise for Swift and Company and Libby, and under his common carrier permit he transported general commodities. The plaintiff June 1, 1935, made a contract with

the Kraft Cheese Company for transportation of its products generally westward from Green Bay and Plymouth, Wisconsin, and northward from Chicago and Freeport, Illinois.

Subsequently to the dates mentioned the plaintiff claims to have made approximately 120 contracts with shippers for the transportation of property, more than 80 of which are still in existence. He has in operation 22 tractors, 22 trailers and 7 trucks. He has about 80 employees, and warehouse and terminal facilities in Minnesota, Wisconsin, Illinois and Iowa.

The plaintiff made timely application for a contract carrier permit. The findings of the Commission made by Division Five (28 M. C. C. 653) prescribe limitations that are the subject of this controversy. These findings provide:

> "Findings.—We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packinghouse products and supplies, from South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis., over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied.
>
> "Upon compliance by applicant with the requirements of sections 215 and 218 of the act, with our rules

and regulations thereunder, and with M. C. C. 628, an appropriate permit will be issued. An order will be entered, denying the application, except to the extent a permit is granted herein."

The Commission has limited the plaintiff to the transportation of "fresh meats, canned foods, dairy products, and packinghouse products and supplies" for "food canneries or meat-packing businesses" within a designated area. The order specifies the class of property that may be transported and the class of shippers that may be served. The plaintiff, while conceding that the Commission may specify the classes of property that may be carried, contends that the Commission is without authority under the law to restrict the permit to certain designated classes of shippers and challenges such limitations on the ground that they are unlawful, arbitrary and not sustained by the evidence. The defendants contend that the Commission has authority to specify not only the classes of property that may be carried but also the classes of shippers that may be served.

Therefore, the question presented is whether the Commission has statutory authority under the Motor Carrier Act to limit a contract carrier to the transportation of designated classes of property for specified classes of shippers.

With the development of the public highway system and the motor vehicle in the United States, the transportation of property by truck became a very considerable factor in the field of interstate commerce. The carrier by truck became a real competitor of the carrier by rail and water; consequently, Congress in 1935 added Part II, applicable to motor carriers, to the Interstate Commerce Act, 49 U. S. C. A. 301, et seq. In 1940 Congress added the "National Transportation Policy.[1]

[1] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage

The Interstate Commerce Act has been in the process of development for half a century. Long ago Congress recognized the imperative necessity of regulating the instrumentalities of commerce in the interest of the public welfare. It likewise recognized the impossibility of writing all the rules and regulations essential to effectuating its policy into statutory enactment; therefore, it embodied the foundation and ground-work in the Interstate Commerce Act, established the Interstate Commerce Commission and conferred upon it extensive powers to deal with the vast problems of transportation.

The Commission is authorized not only to administer the Act but also to interpret it, to hold hearings and to decide questions of fact of greatest importance. It is administrative and quasi-judicial in its functions, and is intended to have ample power to carry out the policy of Congress. Its decisions will not be disturbed by the courts unless they are unlawful or arbitrary, or unless a fair hearing was denied, or they are not supported by the evidence. It is composed of experts whose interpretations are entitled to great weight. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 539; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546. The Court will not substitute its wisdom for that of the Commission. *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, 481; *United States* v. *Carolina Freight Carriers Corporation*, 62 S. Ct. 722, 730. In the Carolina Freight Carriers case the Court said: "We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the

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the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, co-ordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (54 Stat. 899.)

transportation problems which are involved. That function is reserved exclusively for the Commission. United States *v.* Maher, *supra;* Alton R. Co. *v.* United States, *supra.* Our task ends if the statutory standards have been properly applied." In the Manufacturers Railway case, the Court said: "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating in future, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

The Act itself defines the powers and duties of the Commission pertaining to the question with which we are concerned. We thus approach a consideration of the statutory authority of the Commission under the Act. Section 209 (a)[2] of the Act denies the right of a contract carrier to en-

[2] "Sec. 209 (a). No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * *"

gage in business in interstate commerce within the jurisdiction of the United States without a permit by the Commission, and it specifies the conditions that entitle a carrier to a permit.

Section 209(b)[3] outlines the procedure for acquiring the permit and what the permit shall contain. It requires the carrier to show that he is able to render the service of a contract carrier, that he is willing to conform to the law and the lawful requirements of the Commission, and that the proposed operation will be consistent with the public interest and the declared policy of Congress; it further provides that "the Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof." Section 204 (a) (2)[4] provides that it

[3] "Sec. 209 (b). Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the policy declared in section 202 (a) of this part; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6); *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

[4] "Sec. 204 (a) (2). To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

shall be the duty of the Commission to regulate contract carriers by motor vehicle. Section 204 (a) (6)[5] provides that it is the duty of the Commission to administer, execute and enforce all the provisions of Part II of the Act. Section 203 (a) (15)[6] defines a contract carrier, and Section 203(a) (14)[7] defines a common carrier. In short, a contract carrier is one who engages in the transportation of property under individual contracts and is other than a common carrier.

Authority is expressly vested in the Commission, as we have observed, to "specify in the permit the business of the contract carrier covered thereby and the scope thereof." This is a significant provision of the Act and its interpretation is decisive of the principal issue in this case. The permit constitutes the carrier's authority to do business and the specifications in the permit fix the limitations of the business; it may range from very limited to very extensive operations. The Act does not stop with conferring power to specify the business; it expressly adds the power to specify the scope of the business. There was a purpose in this additional provision. Manifestly, the intention was to vest in the Commission broad powers to determine and to specify in the permit, by the use of adequate language to do so, the extent of the operations in which the carrier might engage. The word "scope" is a comprehensive term as used in the

[5] "Sec. 204 (a) (6). To administer, execute, and enforce all other provisions of this part, to make all necessary orders in connection therewith and to prescribe rules, regulations, and procedure for such administration."

[6] "Sec. 203 (a) (15). The term 'contract carrier by motor vehicle' means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation."

[7] "Sec. 203 (a) (14). The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

Act and is for the purpose of enabling the Commission to prescribe a limited or an extensive range of operations in accordance with the rights of the carrier as determined by the character and extent of the service furnished on July 1, 1935. The Commission has ample authority under the Act to designate the classes of shippers that may be served in addition to the classes of property that may be transported, in specifying the business and the scope thereof, if it is necessary or convenient to do so. The business of the shipper may be described in the permit if it thus can be made more accurately to define the limitations of the business of the carrier. The language of the Act is plain and simple. An application for a permit could be made under the grandfather clause, a hearing held and the facts determined by the Commission. Authority was vested in the Commission to determine the character and extent of the service on the crucial date and to issue a permit in accordance therewith; and the power to specify the scope of the business meant the authority to define the extent of the operations that might be conducted under it. This means that the Commission could select the language and the method of specifying the scope of the business. Unless the Commission has such authority it cannot carry out the announced policy of Congress.

The Commission has been confronted with the question now before us. *T. B. Longshore, Contract Carrier Application*, 2 M. C. C. 480; *Keystone Transportation Company, Contract Carrier Application*, 19 M. C. C. 475; *John F. Noble, Contract Carrier Application*, 28 M. C. C. 653, the case under consideration. The argument has been made that the Commission in the Keystone case took a position inconsistent with its decision in the Longshore case, and that in this case it has followed the Keystone decision. In its report in this case the Commission said: "The question of the form of authority to be granted to contract carriers of retail food store commodities was considered at length in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, and the same problem with respect to defining the business of applicant and the scope thereof is here presented. In granting authority herein, we shall accordingly

adopt the general form of authority used in the cited case with appropriate modifications."

In the Longshore case the carrier applied for a permit to transport steel products. Protestants agreed to withdraw opposition to the application on condition that the service of the applicant be limited to a designated company, the only one applicant had been serving. The Commission refused to name the company in the permit on the ground that it would prevent the addition or substitution of contracts as provided by law. The phrases "within the scope of the permit" were construed by the Commission to relate to the routes or territory which the carriers served and to the commodities which it was authorized to transport and not to the shipper. Obviously, the facts in that case were such as not to require a specification of the class of shippers, as a permit without such limitation would not enable the carrier under the circumstances to extend his operations to the transportation of general commodities for a large number of shippers.

In the Keystone case application was made to serve a chain wholesale and retail grocery and food business engaged in dealing in a great variety of commodities. The services of the carrier had been integrated with the business of the shipper so that it was rendering a highly specialized form of service. The appellant sought to have its business specified in terms of commodities, as in the Longshore case, but the Commission refused for the reason that merely naming the commodities that the carrier had been transporting in fact would impose no limitations whatever; consequently, the Commission found it necessary for effective regulation, in addition to specifying the commodities, to designate the class of shippers that might be served.

The inherent nature of the business in the Longshore case constituted an effective restriction, while the same specification in the business in the Keystone case as that adopted in the Longshore case would have permitted the carrier to engage in the transportation of general commodities for all shippers. While the specification of the business in the Longshore case was suitable under the facts in that case, it did not meet the requirements of the Keystone case.

In the Longshore case the Commission went as far as it needed to go under the circumstances while in the Keystone case it was required to impose an additional limitation to avoid authorizing the transportation of general commodities for all shippers. In the instant case the Commission undoubtedly followed its decision in the Keystone case because of the similarity of facts.

The plaintiff has not been injured by the interpretation of the Commission. On the crucial date, he had a contract with Swift, a meat-packing business, and with Libby, a food-canning business. On that date he had no other contracts under which he was engaged in actual operations. The plaintiff may continue operation under these contracts, and he may substitute or add other contracts for the transportation of similar property for food canners and meat packers in the territorial area covered by him on the crucial date. He can carry the classes of commodities specified for any food cannery or for any meat-packing business in the area. If the plaintiff can show that the public interest would be served by his operation as a contract carrier in other fields, he can obtain a permit for such operations. The defendants contend that the plaintiff, under the grandfather clause and without proof of need of new operations, is seeking to extend his business beyond any rights intended to be conferred by the law. In a large measure this is true because of the great variety of products the plaintiff was carrying for Swift and for Libby. If the plaintiff is not limited to serving the classes of shippers with whom he had contracts on the crucial date he could engage in the transportation of an extensive list of goods, wares and merchandise for all shippers. The theory of the plaintiff may be illustrated, as follows: He hauled some paints, some articles of clothing and some hardware for Swift on the crucial date; therefore, he now has the right to haul paint for any paint manufacturer, clothing for any clothing merchant and hardware for any hardware dealer. Such elasticity is not contained in the grandfather clause and such a construction would prevent effective regulation of the transportation industry.

When the Motor Carrier Act was under consideration Congress obviously recognized that motor carriers throughout the country were serving shippers under individual contracts and were equipped in many instances to render a specialized service, and that the continuance of such arrangements was desirable for the benefit of both carriers and shippers; so, the grandfather clause was included in the Act. It was a saving clause designed to save to the contracting parties the carrier service then existing. The Act prescribes the conditions under which the carrier may substitute or add contracts or add to his equipment and facilities. It must be when the proposed operation "will be consistent with the public interest" as provided by Section 209 (b), or "within the scope of the permit" in accordance with the proviso which closes that section. The function of the Commission to determine the scope of the business is not limited by this proviso; indeed, it adds to the certainty of such power.

The briefs in this case contain extensive discussions of the rights of contract carriers versus common carriers. There should be no discrimination between carriers; one class should not receive special privileges in preference to another; one should not be allowed to profit at the expense of another; all should receive equal protection under the law and equal consideration in the process of regulation: and this very problem of fixing, maintaining and administering equal justice to all carriers is one of the chief objectives of the Interstate Commerce Act. Naturally, there is a clash when business interests come into competition; then the supervision and the authority of the Commission becomes useful. The welfare of the common carrier interests becomes involved in controversies such as this at the point where the Commission is required to consider the effect of its action on the transportation system as a whole. In the administration of the law, constant consideration must be given to the effect of every act of the Commission on all shippers and carriers. Accurate interpretation and effective regulation can result only from a broad perspective of the whole plan of carrier regulation and not from a view of the effect on affairs of one shipper or carrier.

A question is presented as to the validity of the claims based on the written contract made by the plaintiff on June 1, 1935, with the Kraft Company to transport its products. Operations were commenced under this contract in March, 1936, westbound from certain points in Wisconsin and northbound from Chicago. Extensions of this service later were made to other points in Wisconsin, Minnesota and North Dakota. The Commission held that this was an unauthorized extension of service commenced after the "grandfather" date and was not within the scope of the permit. Section 209 (a) of the Act provides that an applicant is entitled to a permit covering operations on or before July 1, 1935, "if such carrier was in bona fide operation" on that date and "has so operated since that time". Undoubtedly, the statute contemplated actual operations on the crucial date and the grandfather rights are measured by the character and extent of the service then being rendered.[8] Actual and substantial, rather than potential service, is essential under the law.[9] The proviso confers a special privilege and extends only to carriers plainly within its terms.[10] The execution of the written contract with Kraft is evidence of an intention to begin service, but it was nearly eight months before operations under it were commenced and that does not meet the requirements of the statute. If there had been any intention to recognize merely the existence of a contract as a basis for a permit Congress undoubtedly would have so provided. The decision of the Commission on this question must be sustained.

The validity of the order of the Commission designating territorial limits depends on whether it is supported by substantial evidence. The statute recognizes the right to a permit "over the route or routes or within the territory"

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[8] *Alton Railroad Company* v. *United States*, 315 U. S. 15, 62 S. Ct. 432. *United States* v. *Maher*, 307 U. S. 148.
United States v. *Rosenblum Truck Lines, Inc.*, 62 S. Ct. 445, 315 U. S. 50.

[9] *McDonald* v. *Thompson*, 305 U. S. 263.
United States v. *Carolina Freight Carriers Corporation*, 62 S. Ct. 722, 315 U. S. —.

[10] *Gregg Cartage & Storage Company* v. *United States*, 62 S. Ct. 932, — U. S. —.

for which application is made. The Commission is authorized to determine the area.[11] This is a question of fact

[11] *Howard Hall Company, Inc., v. United States*, 62 S. Ct. 732. *United States v. Carolina Freight Carriers Corporation*, 62 S. Ct. 722.

and no showing has been made that the finding of the Commission is not sustained by the evidence.

We conclude that there was a fair hearing in this matter, that the findings of fact are supported by substantial evidence, and that the decision of the Commission is lawful and not arbitrary. Findings of fact, conclusions of law and an order for judgment will be made and entered accordingly.

St. Paul, Minnesota, July 22, 1942.

JOHN B. SANBORN,
United States Circuit Judge.
GUNNAR H. NORDBYE,
United States District Judge.
ROBERT C. BELL,
United States District Judge.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

Civil No. 281.

JOHN F. NOBLE, Doing Business as Noble Transit Company, *Plaintiff,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Findings of Fact and Conclusions of Law.

This cause came on to be heard before a statutory court consisting of John B. Sanborn, United States Circuit Judge, Gunnar H. Nordbye, United States District Judge,

and Robert C. Bell, United States District Judge (28 U. S. C. A. 41, 43, 48), upon application of the plaintiff for a temporary injunction to restrain the enforcement of an order of the Interstate Commerce Commission granting to plaintiff a permit as a contract carrier under the so-called "grandfather" clause of Section 209(a) of the Motor Carrier Act, 1935 (49 U. S. C. A. 309(a)). The complaint alleges that the order is unlawful, as not being authorized by the statutes in respect to the limitation therein fixed, which authorizes a transportation service only to persons who operate food canneries and meat-packing businesses, and in respect to the territorial limitations, it being contended that the record evidence does not provide substantial support for the order.

The Contract Carrier Division of the American Trucking Association and the Kraft-Phoenix Cheese Corporation intervened in supported of plaintiff, and the Common Carrier Division of the American Trucking Association and the Trucking Association of Minnesota, Wisconsin and Dakotas, intervened in support of the defendants. Counsel representing plaintiff, defendants and interveners were present at the hearing, when evidence taken before the Commission was introduced, together with all orders made and entered by the Commission. The case, upon stipulation of parties in open court, was submitted for final decree and determination.

The Court, being fully advised in the premises, and pursuant to Rule 52 of the Rules of Civil Procedure, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

I.

Plaintiff is a resident of and maintains his principal place of business within the jurisdiction of this Court.

II.

The plaintiff, John F. Noble, doing business as Noble Transit Company, filed with the Commission an application under the "grandfather" clause of Section 209(a) of the

Motor Carrier Act of 1935 (49 U. S. C. A. 309(a)), seeking, as amended, a permit authorizing continuance of operations as a contract carrier by motor vehicle in interstate or foreign commerce, of general commodities, with certain exceptions, between specified points and areas in the states of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, over regular and irregular routes.

III.

After hearing, the Commission found that the applicant was engaged in the business of a contract carrier by motor vehicle in interstate or foreign commerce on or prior to July 1, 1935, under individual contracts with persons (as defined in Section 203(a) (1) of the Act, 49 U. S. C. A. 303(a) (1)) who operate food canneries or meat-packing businesses, in the transportation (a) of canned foods from Blue Island, Illinois, to St. Paul, South St. Paul, Minneapolis and Minnesota Transfer, Minnesota, (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies from South St. Paul to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa state lines near Dubuque, Iowa, to LaCrosse, Wisconsin, and U. S. Highway 53 from LaCrosse to Cameron, Wisconsin, and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minnesota, and LaCrosse, Wisconsin; over irregular routes, and granted to applicant a permit authorizing continuance of such operations. Plaintiff complains that the Commission has no statutory authority to specify in the "grandfather" permit granted, the business of the contract carrier and the scope thereof, as a transportation service for persons who operate food canneries and meat-packing businesses and can only specify such business and the scope thereof as being the business of a contract carrier within a designated territory. Plaintiff also complains that the Commission order, in limiting the territory in which operations may be conducted, denies, without evidence support, some territory

claimed as a "grandfather" right. Plaintiff also complains that the Commission order, in holding that the service to Kraft-Phoenix Cheese Corporation, under a written contract entered into on June 1, 1935, where no transportation was rendered until March 1936, was an unauthorized extension of operations, is without statutory authority, and that plaintiff had the right to so extend his operations under the provisions of Section 209(a) (b), (49 U. S. C. A. 309(a) (b)).

IV.

The plaintiff filed a petition for reconsideration by the Commission, which petition was denied.

V.

At the hearing in this case plaintiff introduced in evidence a certified copy of the record before the Commission upon which the order under review was based.

CONCLUSIONS OF LAW.

I.

The Court has jurisdiction of the action herein.

II.

The Commission report and order of May 13, 1941, were made after a full hearing.

III.

The Findings of Fact upon which the order is based are supported by substantial evidence.

IV.

The Commission order is supported by the Findings of Fact.

V.

The Commission's construction of the pertinent provisions of the Act is correct and the order is valid.

VI.

The complaint should be, and hereby is, dismissed for want of equity.

St. Paul, Minnesota, July 22, 1942.

JOHN B. SANBORN,
United States Circuit Judge.
GUNNAR H. NORDBYE,
United States District Judge.
ROBERT C. BELL,
United States District Judge.

APPENDIX "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION.

Civil No. 281.

JOHN F. NOBLE, Doing Business as Noble Transit Company, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order.

The above entitled action came on for hearing on March 30-31, 1942, plaintiff and defendants being represented by counsel, and being submitted upon the pleadings, oral arguments and briefs of counsel, and the Court having entered its Findings of Fact and Conclusions of Law deciding that the complaint herein should be dismissed, it is therefore

ORDERED AND ADJUDGED, That the complaint herein be, and the same hereby is, dismissed at the cost of plaintiff.

St. Paul, Minnesota, July 22, 1942.

JOHN B. SANBORN,
United States Circuit Judge.
GUNNAR H. NORDBYE,
United States District Judge.
ROBERT C. BELL,
United States District Judge.

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Supreme Court of the United States

October Term, 1942

Docket No. 511

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

CHARLES A. LETHERT,
650 Endicott Building,
St. Paul, Minnesota,

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Minneapolis, Minnesota,

ATTORNEYS FOR PLAINTIFF-APPELLANT.

Dated this 15th day of September, 1942.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

INDEX.

	Page
Statement of Facts	2
Argument	9
Bases of Appellee's Motion to Affirm are Untenable	9
Commission's Findings and Order, and Lower Court's Affirmance Thereof are Based on Erroneous and Unwarranted Interpretation of Law	11
Longshore Case and Keystone Case properly Differentiated with Respect to Appellant's "Grandfather" Operation	11
Classification and Designation of Shipper's Business, If Warranted, Must Embrace Entire Scope of Shipper's Business	19
The Motor Carrier Act Contemplates Equal Protection for Both Contract Carriers and Common Carriers	26
The Kraft Cheese Company Contract is Part of Appellant's Bona Fide "Grandfather" Operation	28
Denial of Fair Hearing	32
Enforcement of Commission's Order Will Result in Irreparable Injury to Appellant and Materially Curtail and Impair His "Grandfather" Rights	34
Substantial Questions Involved Not Determinable on Motion to Affirm	35
Conclusion	38

AUTHORITIES CITED.

Page

Alton Railroad Co. v. United States, 62 Sup. Ct. Rep. 432 29

Application of Powell Brothers Truck Lines, 9 M. C. C. 785 27

Brown Motor Freight Lines, Inc., Extension Application, 2 M. C. C. 607 39

C. M. St. P. & P. R. R. Co. v. U. S., 33 Fed. 2nd. 582. 28

Detroit-Pittsburg Motor Freight v. U. S. & I. C. C., Civil Action No. 2091, March 25, 1942 42

Gregg Cartage & Storage Co. v. United States, 62 Sup. Ct. Rep. 932 30

Keystone Transportation Co. Contract Carrier Application, 19 M. C. C. 475, 1 Fed. Car. Cases, 374, 389 .....8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 27, 33

Longshore Contract Carrier Application Case, 2 M. C. C. 480; 1 Fed. Car. Cases 671 .....8, 9, 12, 14, 15

McDonald v. Thompson, et al., 305 U. S. 263, 266.... 29

Texas, etc., R. R. Co. v. I. C. C. (N. Y.) 162 U. S. 197; 16 S. Ct, 666; 40 L. Ed. 940 41

U. S. v. Carolina Freight Corp., Vol. 62, No. 9, Sup. Ct. Rep. 722, 727-28 .....28, 31, 41

U. S. v. Maher, 307 U. S. 148 29

U. S. et al. v. N. E. Rosenblum Truck Lines, Inc., 62 Sup. Ct. Rep. 445 .....27, 41

U. S. v. Pa. R. R., 266 U. S. 101; 45 S. Ct. 43; 69 L. Ed. 243, reversing 295 Fed. 523..... 41

STATUTES CITED.

	Page
Motor Carrier Act—	
Sec. 203 (a) (15)	9, 11, 21, 23
Sec. 203 (a) (19)	17, 31
Sec. 206 (a)	17
Sec. 209 (a)	10, 23, 26, 30
Sec. 209 (b)	9, 11, 14, 15, 16, 23, 24, 25; 26, 31, 40
Sec. 210	6

Supreme Court of the United States

October Term, 1942

Docket No. ——

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

Pursuant to Rule 12, paragraph 3, and Rule 7, paragraphs 3 and 4, the appellees have made and filed their motion herein that the decree of the District Court of the United States for the District of Minnesota, Third Division, be affirmed (Rec., Doc. No. 19), and the appellant hereby answers said Motion, and sets forth the following reasons why the motion to affirm should be denied.

STATEMENT OF FACTS.

The appellant introduced good and sufficient evidence before the Interstate Commerce Commission to establish the facts that he started in the transfer and transportation business by motor vehicle as a general contract carrier in 1931, *holding himself* out to the general public as such, and that he also operated as an irregular carrier of general commodities, having obtained a permit from the State of Wisconsin for movements of *general commodities* between Chicago and St. Paul and Minneapolis, and soliciting business from whomsoever he could get it, in both of his carrier operations (Rec., Doc. No. 5 with Exhibits; and Doc. No. 7, Lower Court's Primary Findings, p. 3).

Forsaking neither his *general* contract carrier status nor his status as an irregular carrier of general commodities, but in pursuance thereof, he entered into a contract, in November, 1934, with Swift & Company, a general food products concern, and with its subsidiaries and affiliates, for the movement of any and all merchandise for that company and its subsidiaries and affiliates in the trade territory of the South St. Paul plant, which required him to operate, and in which he did operate, prior to the critical statutory date, July 1, 1935, *between* points and places in the States of Minnesota, Wisconsin, Iowa and Illinois, and the Cities of Grand Forks and Fargo, North Dakota. His was in all respects a *territorial* operation. At the same time, he carried on his movements of *general commodities* between Chicago and the Twin Cities area. Proper licenses and permits were issued to him by various states for this dual operation which at that time had not been held un-

authorized by the subsequent Motor Carrier Act that, by Sec. 210, makes a dual operation lawful only for good cause shown (Rec., Doc. No. 5; and Doc. No. 7, Lower Court's Primary Findings, p. 3).

A contract, similar to the Swift & Company contract, was entered into on February 6, 1935, with Libby, McNeill & Libby of Chicago and Blue Island, Illinois, a general food products concern specializing in canned goods, and with that company's subsidiaries and affiliates.

Plaintiff-appellant was under contract obligation to transport for Swift & Company and Libby, McNeill & Libby anywhere in this entire territory, and in connection with these movements, but also independent of those contracts, he transported general commodities between Chicago, Illinois and the Twin Cities area (Rec., Doc. No. 5; and Doc. No. 7, Lower Court's Primary Findings, p. 3).

On June 1, 1935, plaintiff again, under his *general* contract carrier status, entered into a similar contract with Kraft-Phenix Cheese Company, now known as Kraft Cheese Company, also a general food products concern, for the transportation of its products generally westbound out of Green Bay and Plymouth, Wisconsin, and north-bound out of Freeport and Chicago, Illinois (Rec., Doc. No. 7, Lower Court's Primary Findings, pp. 16-17).

He added materially to his equipment and personnel at great expense in order to carry out this contract, and was obligated and stood ready at all times from June 1, 1935, to transport the Kraft Cheese Company products when and wherever directed by that Company, in and within his territorial operation, while, at the same time, he continued to carry on his movements of general commodities between

Chicago and the Twin Cities area in connection with these movements but independent of that contract (Rec., Doc. No. 5, 5a and 5b).

The Kraft Company, after the execution of the contract, undertook to make a new arrangement in its method of distribution which caused an interruption of service for them beyond the control of the carrier until after July 1, 1935. Insofar as the carrier was concerned there was no simulated service, but an actual contractual obligation to serve. The initial service to the shipper was the execution of the contract itself.

Since these operations, appellant, with the knowledge and sanction of the Commission with whom his contracts and schedules were appropriately filed, has entered into approximately 120 contracts with shippers, 83 of which contracts are still existent (Rec., Doc. No. 5; and Doc. No. 7, Lower Court's Primary Findings, p. 3). All these contracts appellant believes to have been and to be within the scope of his general contract carrier status, and his status as an irregular carrier of general commodities, and to be within the scope of his operation and have the same validity, as his contracts with Swift & Company, Libby, McNeill & Libby and Kraft Cheese Company, and their subsidiaries and affiliates. He has, at large expense, increased his equipment and facilities for successful operation to 22 tractors, 22 trailers and 7 straight trucks, and has acquired considerable office equipment and well-equipped terminals and warehouses. He has engaged the services of many competent drivers and mechanics, having now approximately 80 full-time employees. He was the first operator to establish relay runs between the Twin Cities and Chicago.

has transported in the past few years, and is transporting approximately 100 million pounds a year within his "grandfather" territory. All these operations have been, *continuous* operations for close to 8 years (Rec., Doc. No. 5, 5a and 5b), conducted in good faith, many of them prior to the "grandfather" statutory date, with full knowledge and sanction of the Commission, and they all are within the natural, normal and logical scope of his business as a general contract carrier for which he held himself out to the public, and as an irregular carrier of general commodities between Chicago, Illinois, and the Twin Cities area, for which he also held himself out lawfully to the public and actively solicited the public prior to, on and subsequent to the crucial "grandfather" date. All these operations are squarely within the definition of a contract carrier and the *business* of the carrier and the *scope* thereof" which Congress has set forth in the Motor Carrier Act, Sec. 203 (a) (15) and Sec. 209 (b).

Appellant was also a member of, and registered under, the N. R. A. and the Code of Fair Competition for the trucking industry prior to July 1, 1935, which registration, under Sec. 209 (a), is by the Act itself held as evidence of his bona fide "grandfather" operation.

The form of applications prepared by the Interstate Commerce Commission for "grandfather" permits or certificates required the applicant to state his main or principal operation, and appellant did state on his said application his main or principal operation to be that for Swift & Company, Libby, McNeill & Libby and Plankinton Packing Company, Milwaukee, Wisconsin, *and others*, within his "grandfather" territory, setting forth that the products he transported

consisted of *commodities generally, meats and packing house products specially* (Rec., Doc. No. 5a). This operation, however, by no means encompassed all of appellant's bona fide "grandfather" operation. This was clearly established by undisputed evidence at the hearing on his application and was admitted in the Findings of the Commission itself (Rec., Doc. No. 2, Exhibit A, Sheets 9, 10 and 11, and Doc. No. 5, Exhibits Nos 4 and 6).

His application was in alternative form, either for a permit as a general contract carrier by motor vehicle, or as a common carrier by motor vehicle, or both in the discretion of the Commission for good cause shown under Section 210 of the Motor Carrier Act.

The Commission, in its Findings, admitted, and the exhibits in evidence show, that the appellant, within the "grandfather" period, transported *a wide range of commodities*, including many food products other than canned goods, dairy products, fresh meats and packing house products and supplies, not only over the irregular routes from, to and between points and places within his "grandfather" territory, but over regular routes between Chicago, Illinois, and the Twin Cities area (Rec., Doc. No. 5, 5a and 5b).

He was, as indicated, an irregular carrier of general commodities in addition to a general contract carrier over irregular routes within his "grandfather" territory, and, as stated, was actively soliciting whatever he could get at any of the points and places in his territorial operation.

The Commission, however, in its Findings and Order, and the lower Court, in its affirmance of those Findings and that Order, erroneously restricted the appellant's bona fide "grandfather" operation not only to merely certain types of commodities appellant transported, and to a much more

circumscribed territory than his operation encompassed by limiting his activities *from* certain points and places *to* designated destinations rather than *between* points and places in his territorial operation and thus depriving appellant of a profitable back-haul movement, but also restricted his general contract carrier *business* and the *scope* thereof to certain shippers or class of shippers. In fact, the Commission made a further arbitrary and unwarranted restriction in classifying the comprehensive business of the shippers within the very narrow limits of a major product in which the shippers deal, or of some special branch of their business, holding:

> "*Findings:* We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in Section 203 (a) (1) of the act) who operate *food canneries* or *meat-packing businesses*, (a) of canned foods, *from* Blue Island, Illinois *to* St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing house products and supplies, *from* South St. Paul, *to* Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, *to* La Crosse, Wis., and U. S. Highway 53 *from* La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the *commodities described in (b) from* Chicago *to* St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over *irregular* routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other

respects the application should be denied." (Italics ours.) (Rec., Doc. No. 2, Exhibit A.)

The Commission, in appellant's case, in the face of its Findings that appellant had continuously transported a wide range of commodities other than canned foods, fresh meats, dairy products and packing house products and supplies, not only for food canneries and meat packers but as well for general food products and other concerns, applied to appellant's case the arbitrarily restrictive policy and unwarranted interpretation of the Motor Carrier Act it had adopted in the *Keystone Transportation Contract Carrier Case*, Motor Carrier Cases, 475; 1 Federal Carrier Cases, 374, 389, stating:

> "The question of the form of authority to be granted to contract carriers of *retail food store commodities* was considered at length in Keystone Transp. Co. Contract Carrier Application, 19 M. C. C., 475, and the same problem with respect to defining the business of the applicant and scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications." (Italics ours.) (Rec., Doc. No. 2, Exhibit A, Sheets 11 and 12.)

In that case, after four (4) years of operation under the Act, the Commission, Division 5, assumed the power, for which it had theretofore emphatically held in the *Longshore Contract Carrier Application Case*, 2 M. C. C., 480; 1 Fed. Car. Cases, 671, there was no warrant whatever in the Act, to restrict the business of the carrier and the scope thereof not only to certain specified commodities and within a specified territory but also to certain shippers or classes

or types of shippers. In appellant's case, the Commission made the restriction of *food store commodities* even far narrower by limiting his entire bona fide "grandfather" operation as a general contract carrier and irregular common carrier to individual contracts with *food canneries* and *meat packing businesses.*

The Commission's Order was issued to limit appellant's operation in accordance with its above Findings.

ARGUMENT.

BASES OF APPELLEES' MOTION TO AFFIRM ARE UNTENABLE.

Appellees' Motion to Affirm is primarily based on the premises that appellant's bona fide "grandfather" operation was similar to the operation of the carriers in the Keystone Transportation Contract Carrier Case (supra), which it was not, rather than to the operation of the carrier in the Longshore case, which it was, and that the Findings and Order of the Commission and the affirmance thereof by the lower Court were, it is alleged, legally based on the Keystone decision. That decision was never reviewed by this Court. Division 5 of the Commission held, in that case, as heretofore stated, it had power, under the Motor Carrier Act, in defining "the business of the contract carrier and the scope thereof" under Sec. 203 (a) (15) and Sec. 209 (b), to limit and restrict that business and scope not only to certain designated territory and certain specified commodities, as it did in the Longshore Case (supra), but also to certain shippers or class of shippers whom the carrier may serve.

By their motion, appellees erroneously seek to maintain that the Commission's decision in the Keystone case is *res adjudicata*, which it is not, and that its application to any other contract carrier case, whether the facts are similar or dissimilar, is not reviewable by any court of competent jurisdiction.

The Motion to Affirm is further based on the premise that the Commission has the power, under the Motor Carrier Act, to refuse to consider and to exclude all testimony as to the carrier's admittedly valid contract with the Kraft-Phenix Cheese Company made prior to July 1, 1935, and the service rendered the Kraft Company pursuant thereto as part of appellant's "grandfather" operation, solely on the ground that the actual transportation of that shipper's products did not commence until after that date.

By their Motion, appellees however completely ignore the clear provisions of Section 209 (a) of the Motor Carrier Act, applicable to appellant's case, which provides that, where the interruption of service was beyond the control of the carrier, that operation shall nevertheless be considered part of his bona fide "grandfather" operation.

Both bases of the Motion to Affirm are irrelevant to appellant's case, and are contrary to law and the unmistakable intent of Congress as disclosed by the clear and plain provisions of the Motor Carrier Act, as amended in 1940, by what is now known as the Interstate Commerce Act, Part II, and certain applicable provisions of Part I.

COMMISSION'S FINDINGS AND ORDER, AND LOWER COURT'S AFFIRMANCE THEREOF ARE BASED ON ERRONEOUS AND UNWARRANTED INTERPRETATION OF LAW.

Longshore Case and Keystone Case Properly Differentiated With Respect to Appellant's "Grandfather" Operation.

Appellant maintains that the District Court of the United States erred in dismissing appellant's petition for the annulment and enjoinder of the Order of the Interstate Commerce Commission, and in thus sustaining that Order which, by restricting and circumscribing appellant's bona fide "grandfather" operation not only to certain principal designated commodities the carrier transported and to a more limited territory than he served, but also to certain shippers or class of shippers, and even to some special branch or major product of the shipper's business, is an abuse and violation of the Commission's power not authorized by the clear provisions and proper interpretation of the Motor Carrier Act.

In defining in the permit "the business of the contract carrier covered thereby and the scope thereof" under Sec. 203 (a) (15) and Sec. 209 (b), which two Sections are closely and inseparably inter-related and must be considered jointly, the Commission's power of restriction is confined, by the provisions of the Act itself, to restricting that *business* and its *scope* to the commodities transported or to be transported, and to the territory served, or to be served, over regular or irregular routes or both. There is certainly no warrant whatever in the Act, regulatory or otherwise, empowering the Commission, in defining the business

of the carrier and the scope thereof, to narrowly designate the business of the shipper served to some major product the shipper deals in, or to some special branch of his business, in the face of the fact that appellant's contracts with shippers under his bona fide "grandfather" operation called for transportation of *all* their products as directed and that, admittedly, he transported a *wide range of commodities* other than the major products of the shippers.

These unwarranted restrictions, especially the restriction of appellant's "grandfather" operation to certain shippers or class or type of shippers will materially and unlawfully change and pulverize both appellant's contract carrier status and his status as an irregular carrier of general commodities, and will materially and unlawfully restrict appellant's business and his prior opportunities beyond the clear requirements of the statute.

For more than four years after the passage of the Act, the Interstate Commerce Commission itself, in its application and enforcement of the Act, repeatedly held, "after much study" as Commissioner Lee stated in his dissenting opinion in the Keystone case, that, under the Motor Carrier Act, it was "without authority to attach any terms, conditions or limitations to a permit of a contract carrier which would restrict the right of the carrier to substitute or add contracts within the scope of the permit", and that "the *scope* of the permit as used in this Section (Sec. 209 (b)), relates to the routes or territory which the carrier may serve, and the commodities which it may transport, and *not to the shipper or shippers to whom it may render its service.*" (Italics ours.)

In the Longshore case (supra), the Commission clearly and emphatically enunciated that policy and firmly held to

the interpretation that nowhere in the Act was there any authority or power granted the Commission, in determining the "business of the carrier and the scope thereof", to designate the shipper or shippers, or class of shippers the carrier may serve.

While Sec. 203 (a) (15) of the Act defines the business of the carrier as either a carrier of *passengers* or of *property* and Sec. 209 (a) requires the carrier to designate the route or routes over which he transports or the territory he serves, thus giving warrant for restrictions as to property (commodities) or territory, there is nowhere in the Act any reference to the shipper the carrier may serve and no authority or power given the Commission, either directly or by implication, to circumscribe the carrier's business with a restriction of his operation to certain shippers or types of shippers.

That was therefore the interpretation given the Act by the Commission itself prior to and at the time appellant filed his application in February, 1936, for a "grandfather" permit, and the form of application prescribed by the Commission and the hearing thereon in September, 1938, were in conformity to that interpretation. Literally thousands of "grandfather" applications were determined and permits issued by the Commission to motor carriers based upon that interpretation.

Not until after four year of insistence by the Commission that no other interpretation of the law was warranted, namely, not until October, 1939, did the Commission, in the so-called Keystone case, without any change in the law or amendment having been made, conveniently discard that interpretation, and reverse its former clear and well-estab-

lished policy by holding that "the business of the carrier and the scope thereof" also relates to the particular shippers or class of shippers to whom he may render his service.

The lower Court, predicated its Primary Findings upon a differentiation of the Longshore case from the Keystone case and upon an erroneous application of the decision in the latter to appellant's case. The Court set forth that, in the former, which was an application to transport steel products, the limitation as to the shippers would have prevented the addition or substitution of contracts as provided by law (Sec. 209 (b)), while, in the later, in which a very large number of applications by private carriers to serve chain wholesale and retail grocery and food houses were filed at one and the same time, and where the service of the carrier had been entirely integrated with the service of the shipper, the Commission found it necessary to designate the class of shippers that these carriers may serve, for the reason that merely naming the commodities would impose no limitation whatever (Rec., Doc. No. 7, pp. 1244).

However, irrespective of the question whether or not such differentiation as a basis of restricting a carrier's operation has any warrant in the law, the restrictions by the Commission of appellant's bona fide "grandfather" operation can find no legal or logical basis in such differentiation. On the contrary, such differentiation in appellant's case would bring his case in line with the Longshore case and within the negation by the Commission itself of the power to make any restrictions in his permit as to shippers or class of shippers.

The operation of the carrier in the Longshore case was confined as the Commission held, to steel, and steel prod-

nets, and materials and supplies used in the operation and maintenance of plants producing steel and steel products. Appellant's operation, the Commission held, was confined to canned goods, dairy products, fresh meats and packing house products and supplies used in the operation and maintenance of food canneries and meat-packing businesses. If, in the former case, a limitation as to shippers "would have prevented the addition or substitution of contracts as provided by law (Sec. 209 (b))", by what reason, or logic, or on what legalistic grounds can it be held that, in appellant's case, a limitation as to shippers is warranted and that such limitation "would *not* prevent the addition or substitution of contracts as provided by the same law". The two cases are analogous. There is no analogy between appellant's case and the Keystone case.

The Keystone case presented a unique and entirely different situation than is presented in appellant's case. Appellant was in the general trucking business prior to the "grandfather" date as both a contract carrier and common carrier. He was an independent, individual operator who himself built up his business, owned and operated his own equipment and had constantly at great expense added to it and to his facilities and personnel as the development of his business and the demands of the public required. He held an operating permit as an irregular carrier of general commodities from the State of Wisconsin. A permit or certificate from other states for that operation within the territorial area was not then required.

The facts in the Longshore case were set forth in the findings of the Commission in that case as follows:

"Applicant owns two tractors and two 18-foot trailers of ten and twelve tons capacity respectively. He

has operated at a profit in this service, is financially able to carry on his operations, follows good operating practices, and holds a permit from the State of Ohio."

In that case, the applicant had even indicated a willingness to accept a limitation to transportation for a certain shipper, the American Rolling Mill Company, but the Commission insisted it had no authority, under Section 209 (b) or any other provision of the Act, to limit the carrier to a certain shipper or a certain class of shippers.

No such willingness to accept a limitation as to the shipper was indicated in appellant's case.

In the Keystone Case, the Commission's findings as to the business or "grandfather" operations of the carriers who served the American Stores Company was as follows:

"The applications are sponsored by the American Stores Company, a chain grocery store operator. Until recently all the applicants served the company as bona fide, *full-time employees, in the capacity of truck drivers of company-owned equipment.* The company sells grocery and food products in the territory described in appendix B, * * *. In this territory it owns and operates approximately 2,700 retail food stores. * * *

"Until recently the company owned and operated its own motor trucks as a private carrier. For several reasons, including labor troubles and keen competition, the continuation by it of private operation of trucks has become increasingly difficult. It is now the company's plan and desire to withdraw completely from private operation; to use independent contract motor carrier, and to confine its entire efforts to its real objective, the distribution and sale of food and various other commodities handled by its stores."

As to those carriers in the Keystone case who served the Atlantic and Pacific Tea Company, the Commission found as follows:

> "The A & P Company carrier applications covered by this proceeding are listed in appendix F. They were filed under the 'grandfather' clauses of Section 206 (a) and 209 (a) of the act and represent a portion of approximately 600 applications filed by motor carriers serving the company. All these applications were made with the aid of the company, which, with the passage of the act, offered its assistance to the motor carriers serving it to the extent necessary to bring them in compliance with the act and to preserve their rights thereunder.
>
> "The service performed by contract carriers for the company is similar to that proposed to be rendered by the American Stores Company carriers. Such service is substantially that which would be provided by the company in the event it operated its own vehicles in private carriage, with its principal function the distribution of traffic from warehouses, rail terminals, manufacturing plants, and docks to its individual stores."

The applications in the Keystone Case were presented in a "wholesale" lot. A group of 38 or 39 applicants who were merely truck drivers for and employees of American Stores Company—a *private* carrier—and sought a permit to carry on their employer's former *private* operations. They owned no equipment themselves, had no permits from any state to operate as general truckers, contract carriers, had no independent trucking business, and never held themselves out to the public as motor carriers, or solicited business from the public. They were merely employees of

the single shipper they served. This group of private carriers joined with 83 carriers claiming "grandfather" rights who had merely been *pricate* operators for the Great Atlantic and Pacific Tea Company and sought a permit to serve a chain wholesale and retail grocery and thus continue, under contract carrier protection their former private operation. They sought further to broaden the scope of their "grandfather" operation on the basis of the operation they had carried on for a single shipper prior to the crucial "grandfather" date. They too were not in the general trucking business either as contract carriers or common carriers prior to that crucial date, did not hold themselves out to the public as such and did not openly solicit business outside of their operation for the Atlantic and Pacific Tea Company.

Even in its findings in the Keystone case the Commission expressed some uncertainty as to the legality of the reversal of its former decision in the Longshore case. It said:

> "It does not follow that we are required to include in each and every permit a rigid or technical summary for defining the transportation business covered thereby or the scope thereof."

Appellant maintains that, even in the event it be held that the Commission had some warrant for unduly stretching its regulatory power in the Keystone case by narrowing the scope of the business of those multitudinous operators not only to commodities and territory but to a classification of the shipper by reason of the very large number of applicants who at one and the same time sought permits to transport all the commodities dealt in by chain whole-

sale and retail grocery concerns, one of which represented in one territory alone approximately 2,700 retail food stores, there is no such warrant or authority to apply that policy of restriction in the Keystone case to the operation by appellant whose status and bona fide "grandfather" operation presents an entirely different situation than presented in the Keystone case and whose business is in reality analogous to that disclosed in the Longshore case. The classification of the shipper in appellant's case was therefore an arbitrary, unreasonable and unlawful assumption of power by the Commission.

CLASSIFICATION AND DESIGNATION OF SHIPPER'S BUSINESS, IF WARRANTED, MUST EMBRACE ENTIRE SCOPE OF SHIPPER'S BUSINESS.

In the Keystone case, the Commission broadly and comprehensively classified the shippers, American Stores Company and Great Atlantic and Pacific *Tea* Company as *general food products concerns*. However, in appellant's case, after denial of any and all timely petitions of appellant for review, oral argument or reconsideration to determine, among other things, the general business of the shippers he served, namely Swift & Company and Libby, McNeill & Libby, and Kraft Cheese Company, who are all general food products concerns, and the subsidiaries and affiliates of these companies, and, without making specific findings as to what standard the Commission adopted for determination of the classification of these shippers, the Commission unreasonably, arbitrarily and unlawfully defined the shippers by the narrow designation of a special

branch or major product of their business, designating Swift & Company as merely a "meat-packing business", and Libby, McNeill & Libby as merely a "food cannery", and thus limited appellant's permit to persons who operate food canneries or meat packing houses. Thus the Commission destroyed the parity between appellant's future operation and his prior bona fide operation which the statute was designed to preserve.

Swift & Company, by its very Articles of Incorporation, in effect since 1917, and which were in evidence in the lower Court as plaintiff's Exhibit F, is a general food products concern (Rec., Doc. No. 6, p. 1), and has, since that time, continuously operated as such. In fact, those Articles list as the first object for which the company was formed: "to manufacture, buy, sell and deal in and with *any and all foods*. Its second object is stated to be "to manufacture, buy, sell and deal in and with any and all materials, articles, commodities and things which may be manufactured and converted into *foods or the by-products thereof*." The slaughtering of animals and conversion thereof into meats is only the third object stated. So also Libby, McNeill & Libby and Kraft Cheese Company, are general food products concerns, even though, as to the latter concern, the word "cheese" forms part of the firm name, just as the word "tea" forms part of the firm name of the Great Atlantic & Pacific Tea Company.

Congress certainly never intended to give the Commission unlimited power, in determining the "business of the contract carrier and the scope thereof" to restrict that business and scope to such narrow, arbitrary and unreasonable limits as are contrary to and inconsistent with the

comprehensive definition of the *business* of the carrier given by Congress itself in the Act. The clear provisions of the Act as to the designation of the business of the carrier and the scope thereof, especially insofar as "grandfather" operations are concerned, positively negates such power in the Commission, and, as stated, until the Keystone case applications came before the Commission, that body itself firmly held that view.

There has been no change or amendment in the law warranting a different interpretation. In fact, the 1940 Amendment of the Act strongly supports the interpretation given the Act in the Longshore case. The original Act, Sec. 203 (a) defined the business of a "contract carrier by motor vehicle" by designating such carrier as any person which, under *special* and individual contracts, or agreements, engages in the transportation of *passengers* or *property* in interstate or foreign commerce for compensation. The Amendment of 1940, in Sec. 203 (a) of the Act omits the word "*special*" with reference to the carriers' contracts and thus clearly re-affirmed the interpretation it intended in the first place and which the Commission had given the Act before the Keystone case, namely, that a contract carrier shall be considered to be in bona fide operation under individual contracts without *special* or *specialized* service to particular shippers. By that intentional omission in the Amendment of the Act, Congress gave its disapproval of the Commission's restrictive interpretation of the Act in the Keystone case, and, indicated clearly again that it withheld from the Commission the power to designate the business of the carrier and the scope thereof by predicating it upon *special* contracts with or *specialized* service for certain shippers or class of shippers. Congress also, by that

omission of the word "special" sought to wipe out and did wipe out the preference in business or protection the Commission contended, in the Keystone case, the common carriers should have.

Moreover, the Commission in its order and the U. S. District Court in its decision erred in failing to set forth or make any material reference to the ten or more subsidiaries and affiliates of Swift and Company and of Libby, McNeill & Libby, some of whom, such as Derby Foods, Inc., are general food products concerns which appellant, during the "grandfather" period, was not only obligated by contract to serve but did actually serve. Many of those subsidiaries and affiliates are in no sense "meat packing businesses" or "food canneries" or "cheese processing businesses", either in their primary business or incidental business. If a classification of the shippers be held to be authorized in the law and to be a necessary part of the specification of the business of the contract carrier and the scope thereof, then under the very provisions of appellant's contracts with and transportation for shippers, prior, on and subsequent to July 1, 1935, the business of all these subsidiaries and affiliates should have been also separately defined and classified and included in the grant of authority to appellant by the Commission. Otherwise, the Commission could resort to even a more drastic interpretation of the Act by further restricting appellant's business as a contract carrier and the scope thereof to an operation for only meat-packing businesses or food canneries *who have ten or more subsidiaries*, or who have *no subsidiaries*, and thus practically confine his "grandfather" operation to an operation for Swift & Company only, or to an operation

for some minor enterprise. To restrict a carrier's business to certain shippers or types of shippers, and especially to classify the business of shippers, in that connection, within the most narrow bounds by basing that classification on merely a major product in which the shipper deals, or on some special branch of his business is not only not warranted in law, but is utterly repugnant to the American way of living and doing business, destroys individual initiative and enterprise, and subjects such carrier to the will of the shippers in his contractual business relations with them in that he must deal with these particular shippers or have no business at all.

As hereinbefore indicated, the Motor Carrier Act, Section 203 (a) (15), specifically defines the *business* of the motor carrier as either a carrier of *passengers* or a carrier of *property*, and nowhere in the Act is that business defined as an operation for certain shippers or class of shippers.

Likewise, in the law, reference is made to both regular and irregular route carriers, and to the territory in which the carrier has operated or is to operate. (Secs. 203 (a) and 209 (a).)

The word "scope", as used in the Act, especially in Section 209 (b) of the Act, is the only word upon which the Commission can predicate its findings as to the *extent* of the carrier's business, which extent must be considered only in relation to the Congressional definition of the carrier's business as either a carrier of passengers or a carrier of property, and the territory he serves as either a regular or irregular route carrier.

There is nowhere in the law any authority or power given the Commission to go beyond a limitation as to pas-

sengers, property or territory of the carrier, or as to whether he is a regular-route carrier, or irregular route carrier, in his operation under his "grandfather" status.

The lower Court erred in holding that the scope of the business of the carrier has reference to his *individual operations*, stating:

> "Manifestly the intention was to vest in the Commission broad powers to determine and specify in the permit, by the use of adequate language to do so, the extent of the *operations* in which the Carrier might engage. The word 'scope' is a comprehensive term as used in the Act and is for the purpose of enabling the Commission to prescribe a limited or an extensive range of *operations* in accordance with the rights of the carrier as determined by the character and extent or the service furnished on July 1, 1935." (Italics ours.) (Rec., Doc. No. 7, p. 11.)

There is nothing in the language of the Act to warrant such interpretation. The language of the Act is plain and simple as the lower court itself has said (Rec., Doc. No. 7, p. 11). It is not subject to the interpretation given it by the lower court. The language clearly and simply sets forth that the Commission shall specify in the permit the *business* of the carrier and the scope *thereof*, and not his individual operations and their scope.

If there be any ambiguity in the law, Section 209 (b), reference in clarifying that ambiguity and disclosing the true intention of Congress is had to discussions and hearings by Congress on the Bill before its passage.

When the Bill, which later became the *Motor Carrier Act, 1935*, was placed before the Senate Committee on Interstate and Foreign Commerce by Commissioner Eastman,

who was then Federal Coordinator of Transportation, Section 209 (b) provided that:

> "The Commission shall specify in the permit the *operations* covered thereby and the scope thereof * * *"

The Senate Committee eliminated the word "operations" and substituted for it the "*business* of the contract carrier."

This change made by the Senate Committee shows clearly that Congress did not intend that the Commission shall specify, in the permits of contract carriers, the individual operations conducted on the "grandfather" date, but rather that the Commission shall specify, in the permit, a *broad, comprehensive statement* of the *business* in which the carrier was engaged, under the classification set forth by Congress itself, as either a carrier of passengers or carrier of property, and as a regular or irregular route carrier.

If any doubt exists that this was the true intent of Congress in making the change, the following statement made by Senator Wheeler on the floor of the Senate in explanation of this change certainly clarifies that doubt.

> ". . . This section (referring to Section 209) has been changed in lines 19-22, page 27, to make clear that the bill applies to the *business* of contract carriers and not merely *operations* under the individual contracts." 79 Cong. Rec. 5654. (Italics ours.)

If Congress had intended to restrict the business of the carrier to his individual operations and related operations, it would have used a restrictive word such as "limits" or "limitations" thereof. Congress, however, instead used the word "scope". The word "scope" in its natural and usual meaning and as defined by Webster is certainly not a re-

strictive term. It is an all-comprehensive term, and means "amplitude of opportunity"; "free course or vent"; "range"; "length"; "extent"; "sweep". As used in the Motor Carrier Act "The business of the carrier and the scope thereof," it is a relative term. The Commission is to state in the permit of the carrier, the "scope of the commodities" carried, and the "scope of the territory" covered. If it now be held, as was held by the Commission in the Keystone case, that the classification of the shipper also comes within the meaning of the word "scope", though no amendment of the law has directly or by implication made that inclusion, then also, where appellant's contract called for transportation of any and all of the shipper's products as directed, the *entire scope* of the shipper's business, the "extent" thereof, the "sweep" thereof, is to be stated, and not his business given a very restrictive classification by simply designating, as the shipper's business, a major product he deals in, or a special branch of his business. Such a narrow classification of the business of the shipper circumscribes the carrier's "grandfather" rights to a mere semblance of his bona fide "grandfather" operation.

THE MOTOR CARRIER ACT CONTEMPLATES EQUAL PROTECTION FOR BOTH CONTRACT CARRIERS AND COMMON CARRIERS.

Congress made special liberal provisions in Secs. 209 (a) and (b) with respect to the rights of contract carriers as it considered the securing of individual contracts an equalizing restriction in itself, and in section 209 (b) therefore set forth that contract carriers in new or extended applications coming within the national transportation policy

and the provisions of the Motor Carrier Act need show only "consistency with public interest" rather than the more stringent requirements of "public convenience and necessity" imposed on common carriers; and in section 218 of the Act, instead of providing for the same schedule of rates for both contract and common carriers, Congress merely provided that the contract carriers shall be given no preference in the rates they may charge.

The Commission in Keystone case, though limiting the business of the carriers to certain class of shippers, gave to these operators more than they asked for, by granting them authority to operate for *all food stores* in their territory, and in announcing this new policy,—a reversal of its former interpretations of its power,—the Commission set forth, in effect, that a classification of the shipper the carriers in the Keystone case may serve was made necessary *for the special protection of common carriers*—a protection which the law never contemplated to be paramount to the protection of the contract carrier.

In *U. S. et al. v. N. E. Rosenblum Truck Lines, Inc.*, 62 Sup. Ct. Rep. 445, which was analogous to the Keystone case in that the carriers were not independent operators serving the public, but in effect private carriers who only served certain common carriers, the Court held:

> "The Act clearly contemplates that contract and common carriers will offer *competing* types of service." (Italics ours.)

In the application of *Powell Brothers Truck Lines*, 9 M. C. C. 785, the Commission laid down the doctrine that "common carriers * * * cannot operate economically and efficiently if other carriers are permitted to invade

such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular route service", but the Supreme Court in *U. S. v. Carolina Freight Corp.*, Vol. 62, No. 9, Sup. Ct. Rep. 722, 727-28, specifically repudiated that doctrine, holding:

> "Insofar as that view established a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators, it is erroneous as a matter of law * * * We conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers."

And in *C. M. St. P. & P. R. R. Co. v. U. S.*, 33 Fed. 2nd 582, affirmed in 282 U. S. 314, it was held that the Commission operates in a field limited by constitutional rights and legislative requirements and it has only such power as has been expressly delegated or is reasonably necessary to effectuate the delegated power, and it may not substitute for the standards of the Act standards of its own.

The District Court, therefore, erred in supporting this unwarranted policy of special protection of the common carrier by discriminations against the contract carrier that the Commission has applied to appellant's case.

THE KRAFT CHEESE COMPANY CONTRACT IS PART OF APPELLANT'S BONA FIDE "GRANDFATHER" OPERATION

The Commission refused to consider the Kraft Cheese Company contract service part of appellant's bona fide "grandfather" operation, and, over the objections and excep-

tions of appellant, excluded all testimony with reference thereto, on the ground that actual transportation of the company's products did not commence until after July 1, 1935. The lower Court erred in affirming that refusal and exclusion (Rec., Doc. No. 7, p. 16).

We maintain that appellant's case differs materially from those cases heretofore brought before this Court in which a mere potential or simulated service was held to be properly excluded from a bona fide "grandfather" operation.

In *Alton Railroad Co. v. United States*, 62 Sup. Ct., Rep., 132, the court, in connection with its dictum, in a common carrier case, that "'territory' is not a word of art, and that the characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial scope of the operation which may be authorized under the grandfather clause", held that "while the test of a 'bona fide operation' within a specified territory includes 'actual rather than potential or simulated service', it does not necessarily restrict future operation to the precise points or area to be served."

In *U. S. v. Maher*, 307 U. S. 148, there was no contract for a *regular* route service. The operation was held not to be identified with the carrier's bona fide "grandfather" operation as no regular route over which he sought transportation was in existence on June 1, 1935.

In *McDonald v. Thompson, et al.*, 305 U. S. 263, 266, the Commission denied the "grandfather" right of applicant to haul over Texas highways, not because there was no actual operation prior to July 1, 1935, but because the State of Texas had taken away the carrier's right to the proposed operations on the grounds that these operations subjected

the highways to excessive burden and endangered and interfered with ordinary use by the public.

Gregg Cartage & Storage Co. v. United States, 62 Sup. Ct. Rep., 932, involved a very different issue than that presented in appellant's case. The Court merely decided in that case that "the bankruptcy of the motor carrier is an interruption of service within the control of the carrier."

In appellant's case, there was on and prior to July 1, 1935, an actual admittedly valid contract existing between the appellant and the shipper which contract was made in pursuance of appellant's general trucking business, both as a general contract carrier and as an irregular carrier of general commodities. The execution of that contract was in itself the initial *service* to the shipper, as it was negotiated only after considerations and settlements as to rates, necessary equipment and increased personnel to be furnished and territory to be covered. Appellant did add materially to his equipment and personnel, at great expense, for the purpose of carrying out the contract with the Kraft Cheese Company, and was obligated and stood ready at all times from the execution of the contract to transport the Kraft Cheese Company's products when and wherever directed by that company in and within his territorial operation. The Kraft Cheese Company itself, not the appellant as carrier, undertook, after the execution of the contract, to make a new arrangement in its method of distribution which caused an interruption of *service* beyond the control of the carrier-appellant until after July 1, 1935. Under Sec. 209 (a) of the Act, such interruption of service in a "grandfather" operation, does not place that service outside the realm of the carrier's "grandfather" operation, but the service contracted for is to be included in that oper-

ation. The word "service" as used in that Section is a broader term than mere "transportation", "hauling" or the like. It may well include the "assumption of a contractual obligation" and the "preparations" made by the carrier for the benefit of the shipper, to fulfill that obligation. The shipper, by that *service*, is relieved from further negotiations and the execution of a contract with someone else. This interpretation is supported by the decision in *U. S. v. Carolina Freight Carriers Corp.*, 62 Sup. Ct. 722, where the Court held that the Act should be liberally construed and the carrier's prior opportunity should not be restricted beyond the clear requirements of the statute.

The Act itself, Sec. 203 (a) (19), by its very language, in defining the words "services" and "transportation" clearly supports that liberal construction of the word "service" as used in Sec. 209 (b) with reference to "grandfather" operations, and plainly indicate the intent of Congress that it shall be liberally construed. That Section provides:

> "The 'services' and 'transportation' to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with *all facilities* and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce *or in the performance of any service in connection therewith.*"

While the Commission, on August 14, 1942, after the lower Court had rendered its decision in appellant's case, granted appellant authority, under an *extension* application, to carry on his service under the Kraft Cheese Com-

pany contract, by determining that the operation of appellant "under individual contracts with persons who operate *cheese processing businesses* of dairy and similar food products and supplies is lawful, we maintain that that operation for Kraft Cheese Company should have been included in his "grandfather" operation. By not including it in that operation contrary to the provisions of the Act, appellant's "grandfather" rights have been aborted and his opportunity for further extension materially jeopardized by reason of the well-known reluctance and delays by the Commission to grant further extensions and the strong opposition by competitors thereto.

Moreover, by again limiting appellant's operation in that respect to the special shippers or class of shippers the appellant may serve, namely "cheese processing businesses", the same question as the Keystone case presents and the question of the power of the Commission to define the business of the shipper in the most narrow way by reference only to a major product he deals in, or a special branch of his business, are still substantial questions at issue in this case before this Honorable Court, not determinable by Motion to Affirm.

DENIAL OF FAIR HEARING.

Appellant was not a party to the Keystone case, had no notice of it, and, although his own application was filed and a hearing had thereon in conformity to the Commission's own interpretation of the Act at the time, namely, that restrictions in a carrier's permit could relate only to the commodities he transports and the territory he serves,

the Commission decided his case on its later and far more restrictive interpretation of the law and decision in the Keystone case without giving appellant any opportunity, although requested, for oral argument, further hearing or reconsideration or review, in opposition, or for revision or amplification of appellant's application or of his evidence as to the classification of the shipper with respect to his true business and the scope and sweep thereof. All objections and exceptions by appellant were promptly overruled and all petitions flatly denied.

There is nothing in appellant's application, or in the record, to indicate that either the appellant or the shipper were ever given notice or opportunity to show the scope, extent, range or sweep of the shipper's business, and the Commission made no findings upon which it could base a classification of the shipper, and particularly such arbitrary and restrictive classification of the business of the shipper as was made in appellant's case.

The District Court erred in nevertheless concluding in the face of these facts and circumstances and refusals and denials by the Commission, that appellant had a fair hearing, and that the Commission was warranted in deciding appellant's application on the unwarranted and unreasonably restrictive iterpretation of the law set forth in the Keystone case (Rec., Doc. No. 7, p. 18).

ENFORCEMENT OF COMMISSION'S ORDER WILL RESULT IN IRREPARABLE INJURY TO APPELLANT AND MATERIALLY CURTAIL AND IMPAIR HIS "GRANDFATHER" RIGHTS.

The Court erred in holding that appellant has not been injured by the interpretation of the Commission in that he can haul for any meat packing concern or food cannery in his territory (Rec., Doc. No. 7, p. 14). However, from a practical standpoint it means simply that Noble can haul for Swift & Company and Libby, McNeill & Libby because the Commission limited his commodities to fresh meats, canned goods, dairy products and packing house products and supplies for food canneries and meat packing concerns.

Many of the products transported by appellant for Swift & Company and Libby, McNeill & Libby cannot be classed as fresh meats, dairy products, canned goods, or packing house products and supplies. For instance *soap* is one of Swift's & Company's predominant articles, but it is not a packing house product and comes within none of the other commodity classifications. It is an independent product in which Swift & Company deals. The same applies to *peanut butter* and *mayonnaise dressing* and a good many other articles which the appellant has transported in large volume under his bona fide "grandfather" operation.

So also, under the restrictive order of the Commission, he can haul butter for Swift & Company but cannot haul butter for Libby, McNeill & Libby, unless it be canned. He can haul fresh meats and sausages for Swift & Company but he cannot haul either of them for the Peters Sausage Company simply because that company is neither

a food cannery or a meat-packing house. He can haul canned goods for persons who operate merely food canneries, but cannot even haul canned foods for Derby Foods, Inc., a subsidiary for Swift & Company included in the Swift & Company contract, and for whom plaintiff has transported many other food products prior to July 4, 1935.

Such arbitrary and unreasonable restrictions in the Commission's Order would seem to be legally and logically preposterous.

SUBSTANTIAL QUESTIONS INVOLVED NOT DETERMINABLE ON MOTION TO AFFIRM.

The question of the propriety and correctness of the interpretation of the law of unlimited restriction of the carrier's business adopted in the Keystone case, namely that the Commission has the unlimited power in all contract carrier cases under the Motor Carrier Act to restrict the scope of the business of the carrier not only to commodities and territory but as well to a class or classes of shippers, and which policy and interpretation the Commission has applied in appellant's case, has never come before the Supreme Court of the United States, and the instant case is the first case, involving this question, that we believe has ever come before any lower court. It is one of the most substantial questions ever to come before this Honorable Court in the determination of the "grandfather" rights of contract carriers under the Motor Carrier Act. Its proper and final determination is highly important, not only to the carriers but to the public, and will materially affect

the business and welfare of motor carriers in the contract carrier status.

The determination of the corollary question whether the Commission, if it has the power, to classify the shipper and the scope of his business, can predicate that classification and scope upon merely a major product in which the shipper deals, or upon some special branch of the shipper's business, is equally substantial and important.

While appellant's operation for Kraft Cheese Company has recently been held by the Commission to be authorized and lawful, under its granted authority to appellant to transport the products of "cheese processing concerns", the same questions as to the power of the Commission to classify the shipper and the type and extent of that classification remains still a substantial question at issue before this Court.

We maintain also in that connection, that, as under Sec. 209 (a) of the Act, there was an interruption of service in the Kraft Cheese Company operation beyond the control of the carrier, that operation should have been included in appellant's bona fide "grandfather" operation, and not be subjected to determination under an extension application in jeopardy of appellant's rights to further extensions, reluctantly granted by the Commission and which are always subject to strenuous opposition by competitors.

The propriety of the denial by the Commission, and affirmance thereof by the lower Court, of appellant's bona fide "grandfather" operation as an irregular common carrier of general commodities, in the face of the Commission's

and the lower Court's own Findings, to-wit:

> "The plaintiff began a motor transportation business in September, 1934, when he obtained a common carrier permit from the State of Wisconsin for the transportation of general commodities between Chicago, St. Paul and Minneapolis, * * * and under his common carrier permit he transported general commodities (Rec., Doc. No. 5, and Doc. No. 7, Lower Court's Primary Findings, p. 3),

is a very substantial question before this Court.

Moreover, the propriety of the Commission's Order, and the affirmance thereof by the lower Court, limiting appellant's bona fide "grandfather" operation *from* various restricted designated points *to* certain destinations, in the face of the Commission's and the lower Court's own Findings that "he operated *between* points and places in Minnesota, Wisconsin, Iowa and North Dakota" (Rec., Doc. No. 5, and Doc. No. 7, Lower Court Primary Findings, p. 3), is a very substantial question before this Court.

In Alton Railroad Co. v. United States (supra), where authority was granted by the Commission to operate in the designated territory "over irregular routes" through specified states, the Court held that it is plain from the statute that operations need not be restricted to specified routes or between fixed termini.

The question of denial of a fair hearing and due process of law is substantial and not determinable by appellee's Motion to Affirm.

CONCLUSION.

It is here emphatically re-stated that, prior to and on July 1, 1935, appellant was in the general trucking business and held himself out to the public and actively solicited from the public the transportation of any and all commodities as a contract carrier by motor vehicle, under which holding out and solicitation the Swift & Company contract and service and Libby, McNeill & Libby contract and service and the Kraft-Phenix Cheese Company contract and service and the contracts and service with and to the subsidiaries and affiliates of these companies, and others, were negotiated and executed as merely major operations. He was also in the business, under proper state license, of an irregular carrier of general commodities between Chicago, Illinois and the Twin Cities area. He built up his business himself, at great expense, owned his equipment and was an independent operator, and accordingly, made his application in the alternative for either a contract carrier permit or a common carrier certificate, or for both, if good cause be shown.

By the provision in Section 209 (a), namely, "Pending determination of any such application, the continuance of such operation shall be lawful", the law clearly contemplates that a carrier's properly filed "grandfather" application is in effect his permit for the continuance of his operation, until his permit is issued to him. It should be noted that the law refers to his entire general territorial operation (singular), and not to his various, specific and sporadic operations separately. The "scope of his permit", and whatever entire territorial operation—and not merely

some main or major portion thereof—was within the scope of his application was and is lawful until that application is finally determined. As the law provides for judicial review of the Commission's Orders upon which permits or certificates to motor carriers are based, the application cannot be held finally determined until a proper pending judicial review has finally and fairly determined it. It follows, that the carrier's operation after filing his application and pending its final determination is a "bona fide operation" under Sec. 209 (a).

It follows also that, if the entire operation is lawful, pending the final determination of the application, there is a *continuity* of that operation until such determination.

Appellant's operation has been continuous for approximately eight years, and, as was held by the Commission in July, 1940, in *Brown Motor Freight Lines, Inc., Extension Application*, 2 M. C. C. 607, a continued successful operation for even five years raises a strong presumption of a public demand for the continuance of said service.

Such undisputed continuity of service is ample evidence that appellant was in the general trucking business, both as a general contract carrier of *property* and in the business of an irregular carrier of general commodities prior to, on and continuously since July 1, 1935. He could, prior to the effective date, transport property with or without individual contracts with shippers, and he did. His application, while stating his main and major operations as called for, was not like the applications in the Keystone case, one for a permit or certificate, or both, to haul under special contract only certain commodities and for a certain shipper or for special types of shippers, but was predi-

cated upon "grandfather" rights acquired under his territorial operation in his general trucking business.

Section 209 (b) of the Act, relating to "grandfather" rights of a contract carrier, provides with respect to the permit, or with respect to his operation under his pending application before a permit is issued:

> "No terms or conditions or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to its equipment and facilities, within the scope of the permit, *as the development of the business* and *the demands of the public* may require." (Italics ours.)

How can it then be legally held that the addition of all the contracts made and continuous services performed by the appellant within the scope of his bona fide "grandfather" operation as a general trucker, with both a contract and common carrier status, for approximately eight years are unauthorized and unlawful, and that appellant's operation must be restricted to the precise pattern set forth in the findings and order of the Commission and in the decision of the lower Court?

A summary of the United States Supreme Court decisions to date on the "grandfather" rights of carriers leads to the following conclusions:

(1) That the Act, and especially the "grandfather" clause of the Act, is to be liberally construed to achieve that substantial parity between future and prior operations which the statute contemplates, and to preserve the position which the carrier has struggled to obtain in the national transportation system.

(2) That the standards applicable to the determination of the proper authority to be given to a carrier are the same as to regular and irregular route carriers.

(3) That Congress anticipated competing forms of carriage in contract and common carrier service.

(4) That the Commission operates in a field limited by constitutional rights and legislative requirements and it has only such power as has been expressly delegated or is reasonably necessary to effectuate the delegated power, and it may not substitute for the standards of the Act standards of its own.

In *U. S. v. Carolina Freight Carriers Corp.*, (supra), the Court held:

> "It's (the carrier's) *prior opportunity* should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to *preserve* the position which those like appellee have struggled to obtain in our national transportation system." (Italics ours.)

Texas, etc., R. R. Co. v. I. C. C. (N. Y.), 162 U. S. 197; 16 S. Ct. 666; 40 L. Ed. 940.

U. S. v. Pa. R. R., 266 U. S. 191; 45 S. Ct. 43; 69 L. Ed. 243, 243, reversing 295 Fed. 523.

C. M. St. P. & P. R. R. Co. v. U. S. (supra).

U. S. v. N. E. Rosenblum Truck Lines, Inc. (supra).

The Commission and the lower Court further erred, as heretofore indicated, in circumscribing appellant's operation as one *from* certain designated points *to* certain des-

tinations, and thus depriving appellant of any profitable back-haul movement which he carried on under his bona fide "grandfather" operation.

Again, in the case of *U. S. v. Carolina Freight Carriers Corp.*, (supra), the Court held:

> "To appellee such matters involve life and death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall."

A recent case in the U. S. District Court for Northern District of Ohio; *Detroit-Pittsburg Motor Freight v. U. S. & I. C. C.*, Civil action No. 2091, March 25, 1942, was ordered remanded to the Interstate Commerce Commission to reconsider the "grandfather" application and act upon it in accordance with the more liberal principles laid down by the U. S. Supreme Court in the Carolina Freight Carriers case, (supra).

These are substantial questions before this Honorable Court. If this Honorable Court grant the motion to affirm the decision of the lower court, and appellant be denied the opportunity to present his views by further brief and argument, his substantial rights which have been acquired and developed by him through large investments, and years of hard work, will be destroyed, many of his employees will necessarily be thrown out of work, and he will not be able to operate economically or successfully under the Order of the Commission and the decision of the lower Court.

We therefore respectfully submit that the Motion of the appellees should be denied.

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Supreme Court of the United States

October Term, 1942

Docket No. 511

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

APPELLANT'S BRIEF.

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Dated this Fourth Day of March, 1943.

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INDEX.

		Page
I.	CASES CITED	
II.	OPINION OF THE COURT BELOW	
III.	GROUNDS ON WHICH THE JURISDICTION IS INVOKED	1
IV.	STATEMENT OF THE CASE	4
V.	ASSIGNMENTS OF ERROR	11
VI.	ARGUMENT	13
	Summary of Points to be Presented	13–16
	FIRST POINT	16
	SECOND POINT	27
	THIRD POINT	43
	FOURTH POINT	51
	FIFTH POINT	55
	SIXTH POINT	58
	SEVENTH POINT	64
VII.	CONCLUSION	70

AUTHORITIES CITED.

CASES:	Page
Alton Railroad Co. v. United States, 62 Sup. Ct. Rep. 432	53, 62
Howard Hall Company, Inc. v. U. S., Vol. 62, No. 9, Sup. Ct. Rep., Page 732	3
Interstate Commerce Commission v. Southern Pacific, 200 U. S. 536	3
Keystone Transp. Co. Contract Carrier Application, 19 M. C. C. 476	9, 10, 14, 29, 32, 37, 43

Longshore Contract Carrier, Application Case, 2 M. C. C. 480, 1 Fed. Carrier cases, 671 ..... 10, 14, 28, 34, 35, 36
McDonald v. Thompson, et al., 305 U. S. 263, 266 62
Morgan v. U. S., 56 S. Ct. 907 (May 25, 1936) 67
Scott Bros. Inc. Collection and Delivery Service, MC 2744; 1 Fed. Carrier Cases (7089) 70, 73 58
Thomas Jones Contract Carrier Application, No. MC-2062 30
U. S. v. N. E. Rosenbloom, Vol. 62, No. 6, Sup. Ct. Rep., Page 445 ..... 3, 32
U. S. v. Carolina Freight Carriers Corporation, Vol. 62, No. 9, Sup. Ct. Rep., Page 722 ..... 3, 31, 36, 39, 41, 54, 57, 60, 69
U. S. v. Maher, 307 U. S. 148 ..... 3, 62
U. S. v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co., 282 U. S. 311 3
U. S. v. Chicago, Milwaukee and St. Paul R. R. Co., Vol. 51, No. 5, Sup. Ct. Rep., Page 159 4

STATUTES:
Motor Carrier Act now known as Interstate Commerce Act, Part II—
Section 202 (a) 35
Section 203 (a) 14 17
Section 203 (a) 15 ..... 17, 18, 27, 45, 47
Section 203 (a) 19 ..... 60, 61
Section 204 (a) 2, 6, 7 ..... 18, 26
Section 209 (a) and (b) 4, 5, 7, 11, 13, 16, 20, 21, 22, 23, 24, 25, 31, 33, 34, 47, 48, 58, 59, 61, 63
Section 210 ..... 5, 15, 22, 55, 57
Section 205 (b) 66
Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. 111, Tit. 28, Sec. 45a) 1

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (d); U. S. Code, Tit. 28, Sec. 345*f* 1

Urgent deficiencies Act of October 22, 19133 (c. 32, 38, Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III) 2

OPINION OF THE COURT BELOW:

R., 332-350.

CCC Federal Carrier Service 80051, p. 2149.

45 Federal Supplement (No. 9) pp. 793-800.

Supreme Court of the United States

October Term, 1942

Docket No. 511

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

APPELLANT'S BRIEF.

GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is conferred by:

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. 111, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act

of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (d); U. S. Code, Tit. 28, Sec. 345).

Urgent deficiencies Act of October 22, 1913 (c. 32, 38, Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

B. The final decree sought to be reviewed was entered July 22, 1942. The petition for appeal was filed and the Order allowing the appeal was entered August 10, 1942 (R., 349-350).

C. Appellant, a contract carried by motor vehicle, subject to the Motor Carrier Act of 1935, and Amendments thereto, and to the jurisdiction of the Interstate Commerce Commission thereunder, sought, by timely application to the commission for a permit, (MC-70830), to continue his "grandfather" operation under the right granted him by the "grandfather" clause of said Act. His application was in the alternative, either to operate as a contract carrier or as a common carrier, or for just cause shown, to operate in both capacities. The Commission, on May 13, 1941, made its order on said application, effective August 15, 1942, partially denying appellant's "grandfather" rights and materially restricting his bona fide "grandfather" operation, not only as to commodities and territory but more specifically to certain shippers or types of shippers, all of which appellant contends was an arbitrary restriction and an abuse of the authority and power granted the Commission and was contrary to the intent of Congress and the clear provisions of the Motor Carrier Act.

After said denial by the Commission, the appellant filed a suit in the United States District Court for the District of Minnesota on the 8th day of November, 1941, pursuant to 28 U. S. C. 41 (28), 43-48, 49 U. S. C. 305 (g), praying

that the Court suspend, annul, set aside and enjoin the Commission's Order on the grounds set forth in the Statement as to Jurisdiction on file in this appeal in this Court, and which grounds substantially appear in the Subject Index and Points of Fact and Law set forth in this Brief.

The answers of the United States of America and the Interstate Commerce Commission denied the material allegations of the complaint (R., 27-30).

Final hearing was held before the statutory court of three judges on the 30th and 31st days of March, 1942, and Findings of Fact, Conclusions of Law, and Final Decree were filed on the 22nd day of July, 1942, holding the Commission's Order valid, dismissing plaintiff's complaint, and denying to plaintiff the relief sought (R., 348-350). An appeal was thereupon, on August 10, 1942, taken to the Supreme Court of the United States.

D. The questions presented are substantial and of public importance.

E. The following are some of the cases that sustain the jurisdiction of the Supreme Court to review the decree of the District Court;

U. S. v. N. E. Rosenbloom, Vol. 62, No. 6, Sup. Ct. Rep., Page 445;

U. S. v. Carolina Freight Carriers Corporation, Vol. 62, No. 9, Sup. Ct. Rep., Page 722;

Howard Hall Company, Inc. v. U. S., Vol. 62, No. 9, Sup. Ct. Rep., Page 732;

U. S. v. Maher, 307 U. S. 148;

U. S. v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co., 282 U. S. 311;

Interstate Commerce Commission v. Southern Pacific, 200 U. S. 536;

U. S. v. Chicago, Milwaukee and St. Paul R. R. Co.,
Vol. 51, No. 5, Sup. Ct. Rep., Page 159.

STATEMENT OF THE CASE.

This is a statutory appeal from the decision and order of the District Court of the United States for the District of Minnesota, Third Division, dismissing appellant's petition for an order to suspend, annul, set aside and enjoin an order of the Interstate Commerce Commission, issued on May 13, 1941 (28 MCC 653), denying in part appellant's authority he sought, by timely application to the Commission, to continue his bona fide "grandfather" operation as provided for in Section 209 (a) and (b) of the Motor Carrier Act of 1935, as amended in 1940 by what is now known as the Interstate Commerce Act, Part II and certain applicable provisions of Part I. The lower Court held the order of the Commission valid and ordered the petition of appellant dismissed. Appellant's appeal to this Court is taken from that decision and order of the lower Court pursuant to law as set forth in the grounds on which jurisdiction of this Court is invoked.

On July 1, 1935, the crucial date for "grandfather" operations, and for some time prior thereto and continuously thereafter, the appellant was in the business of a general contract carrier by motor vehicle and was also in the business of an irregular carrier of general commodities in a certain designated territory. He was not a private carrier for any one shipper, or a transfer agency for common carriers, but was serving the public. He built up and owned his business and equipment. He operated at a profit in this service, was financially able to carry on his operation and

held permits or certificates from those states within his territory that required them.

He filed a timely application with the Commission under Section 209 (a) and (b) of the Motor Carrier Act for a permit to continue his operation. His application was in alternative form, either for permit as a general contract carrier by motor vehicle or a certificate as a common carrier of general commodities (with exceptions), or both in the discretion of the Commission for good cause shown as provided in Section 210 of the Act. That application was based upon appellant's status on July 1, 1935, as both a contract carrier and a common carrier, which status was acquired and under which he carried on his operation as follows:

Appellant started in the transfer and transportation business as a general contract carrier by motor vehicle in 1934, holding himself out to the general public as such, and he also operated as an irregular carrier of general commodities (with exceptions), holding himself out also to the general public as such, and having obtained a permit from the State of Wisconsin for movements of general commodities between Chicago, Milwaukee and the Twin Cities area. He actively solicited business from whomsoever he could get it in both of his carrier operations. In November, 1934, in his status as a general contract carrier, he entered into a contract with Swift & Company for the carriage of merchandise for that company and its subsidiaries in the trade territory of its South St. Paul plant which required him to operate *between* points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota. Proper licenses and permits were issued by the various states for these operations. A similar contract was made by the appellant in February, 1935, with

Libby, McNeil & Libby, and under his common carrier permit, he transported general commodities. The appellant, on June 1, 1935, made a contract with the Kraft Cheese Company for transportation of its products generally westward from Green Bay and Plymouth, Wisconsin, and northward from Chicago and Freeport, Illinois. Subsequently to the dates mentioned, the appellant claims to have made approximately 120 contracts with shippers for the transportation of property, more than 80 of which are still in existence. He has in operation 22 tractors, 22 trailers and 7 trucks. He has about 80 employees, and has warehouse and terminal facilities in Minnesota, Wisconsin, Illinois and Iowa. *All these facts of appellant's bona fide "grandfather" operation are definitely stated in the Lower Court's Primary Findings* (R. 333, 334).

Appellant was the first operator to establish relay runs between the Twin Cities and Chicago, has transported in the past few years, and is transporting, approximately 100 million pounds a year within his "grandfather" territory. All of appellant's contracts with shippers obligated him to transport similar commodities, property or manufactured products as were included in the wide range of commodities, property or products which he contracted to transport and did transport, in his "grandfather" period, for Swift & Company, Libby, McNeill & Libby, Kraft Cheese Company and their subsidiaries and affiliates, and other shippers; and were transported within the same territory covered by those major shippers. They were clearly within the scope of his general contract carrier status, and his status as an irregular carrier of general commodities. He has, at large expense and diligent efforts, increased his equipment, facilities and personnel for successful, efficient

and expenditious operation. All these operations have been *continuous* operations for close to eight (8) years (R. 23—Findings) conducted in good faith and with full knowledge and sanction of the Commission. All additions and substitutions in appellant's contracts, and operations thereunder since July 1, 1935, were, predicated upon the proviso of Section 209 (b) which provides:

> "No terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

All these operations constitute and did constitute the "business of the carrier and the scope thereof".

Moreover, the appellant was a member of and registered under the N. R. A. and the Code of Fair Competition for the trucking industry prior to July 1, 1935, which registration, under Section 209 (a), is held as evidence of his bona fide "grandfather" operation.

The form of application prepared by the Interstate Commerce Commission for "grandfather" permits or certificates required the applicant to state his *main* or *principal* operation and appellant did state on his said application his main or principal operation to be that for Swift & Company, Libby McNeill & Libby and Plankinton Packing Company, Milwaukee, Wisconsin, *and others*, within his "grandfather" territory, setting forth that the products he transported consisted of *commodities generally, meats and packing house products specially.* The application asked for merely typical things in quite a general way. The Trial Examiner

conceded that applicant was not restricted by his application (R. 34).

The Commission, in its Findings, admitted, and the exhibits in evidence show, that the appellant, within the "grandfather" period, transported *a wide range of commodities* (R. 22), including many food products other than canned goods, dairy products, fresh meats and packing house products and supplies, not only over the irregular routes *between* points and places in his territory, but over regular routes between Chicago, Illinois and the Twin Cities area (R. 21). He was as stated, actively soliciting during his "grandfather" period whatever kind of product he could get at any of the points and places in his territorial operation. After the crucial "grandfather" date, he made additions to his contract in line with his "grandfather" operation.

The Commission, however, in its Findings and Order, and the lower Court in its affirmance of that Order, erroneously and arbitrarily restricted the appellant's bona fide "grandfather" operation not only to certain types of commodities which appellant had transported, and to a much more circumscribed territory than his operation encompassed, but also restricted his general contract carrier *business* and the *scope* thereof to certain shippers or types or classes of shippers. In fact, the Commission made a further more drastic, arbitrary and unwarranted restriction by classifying the comprehensive business of those shippers, who are general manufacturing and food products concerns, within the very narrow limits of a major product in which the shippers deal or some special branch of their business, holding:

"*Findings:* We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in Section 203 (a) (1) of the act) who operate *food canneries* or *meat-packing businesses*, (a) of canned foods, *from* Blue Island, Illinois, *to* St. Paul, South St. Paul, Minneapolis and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing house products and supplies *from* South St. Paul *to* Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River *from* the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, *to* LaCrosse, Wis., and U. S. Highway 53 *from* LaCrosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the *commodities described in (b) from* Chicago *to* St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and LaCrosse, Wis.; over *irregular* routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied" (R. 23). (Italics ours.)

The Commission, in appellant's case, in the face of its own Findings that appellant had transported a wide range of commodities, manufactured products and especially foods, other than canned foods, fresh meats, dairy products and packing house products and supplies (R. 21), applied to appellant's case the arbitrarily restrictive policy and unwarranted interpretation of the Motor Carrier Act it had adopted in the *Keystone Transportation Contract Carrier Case*, 19 MCC, 476, 1 Federal Carrier Cases 374, 389, stating:

"The question of the form of authority to be granted to contract carriers of retail food store *commodities* was considered at length in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 473, and the same problem with respect to defining the business of the applicant and the scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications". (R. 22). (Italics ours.)

In that case, after four (4) years of operation under the Act, the Commission, Division 5, assumed the power for which it had theretofore emphatically held, in the *Longshore Contract Carrier Application Case*; 2 M. C. C., 480, 1 Federal Carrier Cases, 671, there was no warrant whatever in the Act, to restrict the business of the carrier and the scope thereof not only to certain specified commodities and within a specified territory but also to certain shippers or classes of types of shippers. In appellant's case, the Commission made the restriction to *food store commodities* even far narrower by limiting his entire bona fide "grandfather" operation as a contract carrier and an irregular common carrier to individual contracts with *food canneries* and *meat packing businesses*.

The Commission's Order was issued to limit appellant's operation in accordance with its above restrictive findings.

ASSIGNMENTS OF ERROR.

1. The District Court erred in finding that the restrictive provisions of the procedure on determining applications and issuing permits for new or extended operations, outlined in Sec. 209 (b) of the Motor Carrier Act, applied as well to "grandfather" applications and permits (R. 338-339; 343, 344).

2. The District Court erred in finding that, under the Act, the Interstate Commerce Commission had the power, in determining the "business of the carrier and the scope thereof" as provided in Sec. 209 (b), to restrict the "grandfather" carrier to not only the commodities he may transport and the territory he may cover but as well to the shipper or type of shipper he may serve (R. 340-341); that the "business" of the carrier meant simply the extent of his *individual operations* on July 1, 1935 (R. 340-341); and that the Commission's interpretation of the law in the *Keystone Case*, supra, is applicable to appellant's case because of similarity of facts (R. 341-342).

3. The District Court erred in finding that the order of the Commission, in not only restricting the service of the carrier to certain shippers, but in designating the comprehensive food and manufacturing extent of the shippers' business within the narrow bounds of some major product or special branch of the shipper's business, such as "food canneries" and "meat-packing businesses," in appellant's case is valid (R. 349).

4. The District Court erred in finding, in the face of its own Primary Findings of Fact that appellant, during his "grandfather" period operated in his territory *between* points in Minnesota, Wisconsin, Iowa, Illinois and North

Dakota, that the order of the Commission restricting the appellant to an operation merely *from* certain points and places *to* certain destinations is valid (R. 334, 347, 349).

5. The District Court erred in finding, in the face of its own Primary Findings and the Commission's Findings that appellant, during the "grandfather" period, under his common carrier permit transported a wide range of *general commodities*, between Chicago and the Twin Cities area, that the order of the Commission, restricting these commodities to *fresh meats, canned foods, dairy products and packing house products and supplies*, is valid. (R. 21, 22; 334; 349).

6. The District Court erred in finding that the interruption of service to Kraft-Phenix Cheese Corporation under written contract made by appellant prior to July 1, 1935, was not part of his "grandfather" operation under Section 209(a) for the reason that the actual transportation of the Corporation's products was not commenced till after the crucial "grandfather" date, and further erred in its failure to find that such interruption of service was beyond the control of the carrier (R. 344-345).

7. The District Court erred in finding that the appellant may do no more than continue operations under contracts with Swift & Company as a meat packing concern and with Libby, McNeil & Libby as a food canning business and that he may substitute or add only such other contracts for the transportation of similar property for food canners and meat packers in the territorial area covered by him on the crucial date (R. 343).

8. The District Court erred in finding that the Commission's order was made after a full hearing and that the order was supported by the Findings of Fact (R. 348, 349).

9. The District Court erred in finding that appellant has not been injured by the interpretation given the Act by the Commission.

ARGUMENT.

The foregoing assignments of error, while not all individually and specifically elaborated upon in this brief as a matter of conciseness, are intended to be urged and are clearly apparent in the consideration of the points of fact and of law in this case hereinafter presented and of which the following is a summary:

SUMMARY.

FIRST POINT: Congress intended, and clearly expressed its intent in the statute, Sec. 209 (a) and (b) that permits for continuance of "grandfather" operations of contract carriers who were in bona fide operation on July 1, 1935, and continuously since, shall be more liberal, flexible and elastic than permits for new or extended operations; and that the procedure on applications for said permits shall be less formal and restrictive.

a) Any other construction of Secs. 209 (a) and (b) would invalidate the provisos in both.

SECOND POINT: Nowhere in the statute is any authority or power given the Commission, either directly or by implication, to circumscribe the contract carrier's "grand father" business and the scope thereof with a limitation of his operation to certain shippers or types of shippers.

a) The Commission, in the *T. B. Longshore Contract Carrier Application Case*, supra, itself has firmly and emphatically held for some years after the passage of the Act that it has no such authority and power even in issuing permits for new or extended operations.

b) The Commission, without any amendment of the Act warranting a construction that, in determining the business of the carrier and scope thereof, it may limit the carrier to certain shippers of types of shippers, reversed its own definite and emphatic interpretation of the Act in the unique and unusual case of *Keystone Transportation Company Contract Carrier Application*, supra (R. 342), and, erroneously alleging a similarity of facts in appellant's case, applied that interpretation of the Act to the latter case.

c) *Longshore* case and *Keystone* case differentiated, showing similarity of facts of appellant's case with those in *Longshore* case, and dissimilarity with facts in *Keystone* case.

d) Congress itself has prescribed the standards for determining the business of the carrier and the scope thereof, and the Commission cannot substitute standards of its own for that determination.

THIRD POINT: If the restriction of the carrier's business and the scope thereof to certain shippers or types of shippers be nevertheless held authorized under the act, the designation of the shipper's business cannot be capricious or arbitrary, but must embrace the entire scope of the business of the shipper and of the shipper's subsidiaries, and not merely a major product or special branch of their busi-

ness, especially when the "grandfather" contract of the carrier with the shipper calls for transportation of *all* of the shipper's products and of *all* the products of the shipper's subsidiaries, as directed, and the carrier, prior to, on and subsequent to July 1, 1935, has continuously transported such products.

FOURTH POINT: Appellant's bona fide "grandfather" operation was a *territorial* operation, carried on *between* all points and places in said territory as directed by the shippers

a) The fact that a commodity of the shipper has never or only sporadically been transported between certain points in that territory does not warrant the withholding of authority so to do, and the Commission exceeded its authority in restricting appellant's territorial operation to transportation only *from* certain designated points in that territory *to* points of destination therein.

FIFTH POINT: In determining the business, and its scope, of a contract carrier who was in bona fide "grandfather" operation as both a general contract carrier over irregular routes within a designated territory and an irregular carrier of general commodities (with exceptions) over regular routes within the same territory, the latter operation if carried on to povide the carrier with a balanced operation and a profitable back-haul movement is not a dual operation prohibited by Sec. 210 of the Act, and, if it be considered a dual operation, good cause is shown in appellant's case for its continuance.

SIXTH POINT: The statute clearly provides that there shall be included in the permit for the continuance of a "grandfather" operation any regular or seasonable service in which there was an interruption on July 1, 1935, over which the carrier had no control; and therefore appellant's service for Kraft-Phenix Cheese Company, now known as Kraft Cheese Company, under contract entered into prior to July 1, 1935, was improperly excluded from appellant's bona fide "grandfather" operation.

SEVENTH POINT: The denial to appellant of a fair hearing by the Commission and the irreparable injury that will result to appellant from the enforcement of the Commission's restrictive order deprives him of his property without due process of law and is repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the statute.

FIRST POINT.

Congress intended, and clearly expressed its intent in the statute, Section 209 (a) and (b), that permits for continuance of "grandfather" operations of contract carriers who were in bona fide operation on July 1, 1935, and continuously since, shall be more liberal and elastic than permits for new or extended operations; and that the procedure on applications for said permits shall be less formal and less restrictive.

The lower Court, while stating in its findings that the Commission is authorized not only to administer the Act but also to interpret it (R. 336), very aptly states further that the Act itself defines the powers and duties of the Commis-

sion pertaining to the questions with which we are concerned (R. 337). It follows, that the Commission's interpretation of the Act as to its powers and duties must conform to [illegible] definition and to the intent of Congress as deduced from the clear language of the Act, which language, as the lower Court has found, is plain and simple (R. 341).

The pertinent and applicable provisions of the Motor Carrier Act of 1935, as amended in 1940 by what is now known as the Interstate Commerce Act, Part II, are the following:

Section 203 (a), as amended, provides:

> (15) "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engaged in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."
>
> (14) "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

By this section, Congress has defined and described the "business" of the carrier, as "one who engages in the transportation of *passengers* or *property*"—a contract carrier, under individual contracts; and a common carrier by holding himself out to the general public as such.

The lower Court erroneously, but no doubt inadvertently, held applicable to appellant's case the above sections of the law as they were before being amended by the Interstate Commerce Act (R. 340). While the omission of the more comprehensive and clarifying amendment of Sec. 203 (14), as to questions here considered, do not directly affect the issue, the omitted amendment of Sec. 203 (15) has a vital bearing upon that issue and should have been considered and invoked in the lower Court's decision.

The original provision of Section 203 (15) as quoted by the lower Court provided that "the term contract carrier by motor vehicle" means any person * * * who or which, under *special* and individual contracts * * * transports passengers or property in interstate a foreign commerce by motor vehicle for compensation". The amendment has eliminated the word "special" and now makes it clear that Congress did not intend that the business of a contract carrier and the scope thereof shall be predicated upon *specialized service* peculiar to the needs of particular shippers, but only upon individual contracts with shippers.

The arguments and briefs of counsel in the lower Court emphasized *special contracts* and *specialized service* as warranting the Commission to assume the power to restrict the carrier in his "grandfather" operation to the shippers with whom such special contracts were made or for whom specialized services were rendered.

The amendment of that Section simply makes definitely clear that no such power, predicated upon special contracts or specialized service, was ever intended to be conferred upon the Commission. The Commission and the lower Court erred in not giving due consideration to this amendment.

In adding refrigeration to his equipment as required, the appellant merely exercised his right under the proviso of Sec. 209 (b) "to add to his equipment and facilities as the development of the business and the demands of the public may require".

The power of the Commission to regulate contract carriers by motor vehicle after their rights as contracts carriers by motor vehicle have been definitely established and a permit issued under a proper interpretation and application of the act pursuant to the tests and standards prescribed by Congress, is set forth chiefly in Sec. 204 (a) (2) and (6) and (7) of the Act:

> Sec. 204. (a) It shall be the duty of the Commission—
>
> (2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.
>
> (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration; and
>
> (7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in

which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time, such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.

These premises bring us now to a consideration of the primary Section of the law involved in this case and which together with Sec. 203 (a) heretofore quoted, confer upon contract carriers in bona fide operation on July 1, 1935, "grandfather" rights, and in which Congress prescribes the method and manner of protection of these rights together with the tests and standards by which the Commission shall consider and act upon applications therefor and issue permits thereunder.

Sec. 209. (a) provides:

"Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is a force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions

of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * * "

Sec. 209 (b) provides:

"Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be

denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2), and (6): Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

Sec. 210, excepted from the aforesaid section, provides substantially that no dual operation as both a contract carrier and a common carrier shall be engaged in *except for good cause shown*, and Sec. 210 (a), also excepted, provides substantially that temporary grants of authority may be granted without further proceedings to enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such needs.

It is admitted and conceded in the findings of the Commission and of the lower Court that the appellant's "grandfather" operation comes within the purview of the "grandfather" clause of Sec. 209(a), and that, on July 1, 1935, and continuously since, he was in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce (R. 23, 333-334). The lower Court further found that appellant, in the "grandfather" period transported

general commodities under his common carrier permit from the State of Wisconsin, for the transportation of general commodities *between* Chicago, St. Paul and Minneapolis (R. 333-334). Such permits from other states in his territory were not then required. There was also no disputing evidence as to appellant's having been registered, on July 1, 1935, under a code of fair competition requiring registration. It is also conceded in the findings that appellant had, prior to July 1, 1935, entered into a valid contract for the transportation of the Kraft Cheese Company products within his territorial area, although the actual transportation of the Kraft products did not commence until March, 1936, by reason of the fact that the Kraft Company undertook a change in method of distribution of its products from Minneapolis and St. Paul.

Sec. 209 (a) specifically provides that "pending determination of any such application the continuance of such operation shall be lawful". Such determination is not final until, upon proper legal procedure, it is reviewed by the Courts. Until then, the *application* is the carrier's permit until it is so finally determined.

There is no dispute about the fact, and the lower Court so found, that the appellant has for more than eight years continuously operated efficiently and successfully, and by Sec. 209 (a) lawfully, under what he claimed in good faith to be his bona fide "grandfather" operation, and, under the proviso of Sec. 209 (b) prohibiting the Commission from imposing upon him any terms, conditions or limitations which would restrict his right to substitute or add contracts within the scope of his permit or to add to his equipment and facilities as the development of the business and the demands of the public may require, has added

and substituted numerous contracts and has, by large investments and at great expense, added materially to his equipment, facilities and personnel (R. 16-17; 334).

By all standards prescribed by Congress for determining "grandfather" operations, the appellant's operation came within the saving clause of Section 209 (a) of the Act. That Section, as indicated, provides, in substance, that a contract carrier whether engaged in a "grandfather" operation or whether he seeks to engage in a new or extension operation must have a permit from the Commission to operate. However, the prescribed method and manner of securing that permit for a "grandfather" operation even for interruptions of service beyond the control of the carrier is, by the very language of the Act, different and more liberal and elastic than the manner and method of securing a permit for a new or extension operation. The law (Sec. 209 (a) clearly set forth that if a contract carrier was in bona fide operation prior to and on July 1, 1935, and continuously since, the Commission *shall* issue him a permit therefor *without further proceedings*. If, however, he is not shown by his application to have "grandfather" rights, then and then only his application shall be determined by the restrictive *procedure* in Sec. 209 (b), and the permit shall be issued or denied *accordingly*.

Surely, Congress, by this clear, mandatory direction to the Commission in "grandfather" operations in Sec. 209 (a), viz: "the Commission shall issue such permit without further proceedings" intended an entirely different and far more liberal action by the Commission on such applications and the issue of such permits than on the applications of carriers who were not bona fide operators prior to July 1,

1935. Sec. 209 (a) requires only, as to "grandfather" operations that the application therefor be filed as provided in Sec. 209 (b), but specifically makes the restrictive procedure provided in (b) inapplicable to "grandfather" applications. Congress thus indicated its intention clearly that permits for "grandfather" operations were not to be so restrictive as to freeze the applicant into the precise pattern of his prior activities.

This differentiation as to procedure cannot be held to be meaningless and mere verbiage. It is a definite standard set by Congress for determining "grandfather" rights and issuing permits thereunder and the Commission can not substitute a standard of its own in that particular.

The lower Court erroneously determined that the procedure of Sec. 209 (b) for new or extension operations was applicable to appellant's "grandfather" case. The Court stated:

> "Section 209 (b) outlines the procedure for acquiring the permit and what the permit shall contain. It requires a carrier to show that he is able to render the service of a contract carrier, that he is willing to conform to the law and the lawful requirements of the Commission, and that the proposed operation will be consistent with the public interest and the declared policy of Congress; it further provides that 'the Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof'" (R. 338-339).

Even if the provision that the Commission "shall specify in the permit the business of the contract carrier and the scope thereof" be held not part of the procedure provided only for new and extension operations but that this direc-

tion to the Commission is applicable to all permits, it does not alter or detract from the clear, expressed and unmistakeable intent of Congress that a "grandfather" operation, in the light of the special "grandfather" clause and the special proviso as to "addition of contracts, etc." shall be more liberally and elastically construed and his business and the scope thereof shall encompass all of his "grandfather" operation, including any and all additions or substitutions of contracts within the scope of his bona fide business as a motor carrier. Even under the very language of the Act (Sec. 209 (b), the only terms, conditions and limitations the Commission may attach to the business of the contract carrier and the scope thereof are definitely set forth to be such as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Sec. 204 (a) (2) and (6), —all of which are provisions for regulations of operation under the permit when issued and cannot be construed as the basis for restrictions or limitations of the permit itself.

Congress having provided specifically in Sec. 209 (a) that, if the operations of the carrier is not a "grandfather" operation, it shall be *decided* in accordance with the *procedure* provided in paragraph (b) of this section *and such permit shall be issued or denied accordingly*, the reasonable and logical construction of the "grandfather" clause can mean but one thing, to-wit: that, in "grandfather" cases, such permit shall not be issued or denied according to that procedure, but as definitely stated by Congress, *shall* be issued by the Commission *without further proceedings*, as a matter of right. In other words, if the Commission nevertheless does undertake to specify in the

"grandfather" permit the business of the contract carrier and the scope thereof, it can do no more than specify that business as a contract carrier of passengers or *property* (commodities) as set forth by Congress itself in Sec. 203 (15) of the Act, and determine, by virtue of the language in the "grandfather" clause, viz., "if such carrier was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes within the territory for which application is made", the *route or routes or the territory over which or within which the carrier may operate.* In none of the provisions of the Motor Carrier Act, applicable to "grandfather" permits, has Congress used any language that could legally be interpreted as granting authority to the Commission to restrict the business of the carrier, or limit its scope to certain shippers or types of shippers. There is no warrant whatever for any restriction in a "grandfather" permit other than a restriction as to commodities and routes or territory. This premise of proper interpretation of the law brings us to a consideration of the Second Point involved in this case:

SECOND POINT.

Nowhere in the statute is any authority or power given the Commission, either directly or by implication, to circumscribe the contract carrier's "grandfather" business and the scope thereof with a limitation of his operation to certain shippers or types of shippers.

For more than four years after the passage of the act, the Interstate Commerce Commission itself, in its interpretation, administration and enforcement of the Act, repeatedly held, "after much study" as Commissioner Lee stated,

that, under the Motor Carrier Act, it was "without authority to attach any terms, conditions or limitations to a permit of a contract carrier which would restrict the right of the carrier to substitute or add contracts within the scope of the permit" and that *"the scope of the permit as used in Section 209 (b) relates to the routes or territory which the carrier may serve, and the commodities which it may transport, and not to the shipper or shippers to whom it may render its service."*

In the *Longshore Case*, supra, decided July 23, 1937, the Commission held to that interpretation, and literally thousands of "grandfather" applications were determined and permits issued by the Commission to motor carriers based upon that interpretation, as pointed out by Commissioner Lee in his dissenting opinion in the *Keystone Case*, supra.

That was the interpretation given the Act by the Commission prior to and at the time appellant filed his application in February, 1936, for a "grandfather" permit, and the form of application prescribed by the Commission and the hearing thereon in September, 1938, were in conformity to that interpretation.

It was not until after four years of insistance by the Commission that no other interpretation of the law was warranted, namely, not until October, 1939, and without having transmitted to Congress "such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary" as provided in Sec. 204 (7) of the Act, and without any amendment authorizing a designation of the shipper in the permit having been made by Congress, that the Commission, apparently

to alleviate its administrative chore in the regulation of the large number of operators who applied for permits at one and the same time, and under the erroneous interpretation of the law that "the underlying purpose of the Act is plainly to promote and protect adequate and efficient *common carrier* service," conveniently discarded that interpretation and held, in the unusual and unique Keystone Case, supra, that "the business of the carrier and the scope thereof" also relates to the particular shippers or class of shippers to whom he may render his service." The lower Court erred in affirming that new interpretation and its application to appellant's case on the ground that a differentiation of the Longshore Case and the Keystone Case indicated a similarity of facts in appellant's case with the facts in the latter.

It is significant, that neither the bona fide operation of the carrier in the Longshore Case nor the operations of the carriers in the Keystone Case were strictly or exclusively "grandfather" operations. The operation in the Longshore case was not commenced until on or about August 15, 1935. In that case, the Commission determined the application, filed February 10, 1936, and issued the permit under the restrictive procedure in Section 209 (b) of the Act provided for new and extension operations; and yet, even in applying that restrictive procedure under which the applicant was obligated to prove "that he is fit, willing and able properly to perform the service and to conform to the provisions of the act and that the operation will be consistent with the public interest and the policy declared in Section 202 (a) of the Act"—all of which he need not prove for the issuance of a "grandfather" permit—the Commission held

that the "scope of the permit", as used in Section 209 (b) relates only to the routes or territory which the carrier may serve and to the commodities which he may transport, and not to the shipper or shippers to whom he may render his service.

In the Keystone case, 38 truck drivers, for a private carrier, on August 28, 1937, filed applications for authority to institute new or extension operations. Just prior to filing the applications, the applicants, as the Commission found, served solely the American Stores Company, a chain grocery store operator, as bona fide, *full time employees*, in the capacity of truck *drivers* of *company-owned* equipment; and that, for several reasons including labor troubles, the company desired to withdraw completely from private operation and to use independent contract motor carriers. In its territory, the company owned and operated approximately 2,700 retail food stores. The applications of 38 private carriers—merely employees—were joined with 83 applications filed by carriers seeking "grandfather" rights, by virtue of their service for the Great Atlantic & Pacific Tea Company, said applications representing a portion of approximately 600 applications filed by motor carriers serving the company. The service of these 83 carriers for the company, the Commission found was similar to that proposed to be rendered by the American Stores Company's carriers.

The Commission, on November 20, 1937, under its adopted practice of disposing of "grandfather" applications informally by the issuance of so-called compliance orders, entered such an order initially on one of the applications (No. MC-2062, *Thomas Jones Contract Carrier Application*), authorizing the carrier to transport, in the terri-

tory authorized, "such merchandise as is dealt in by wholesale, retail and chain grocery and food business houses, and in connection therewith, equipment, materials, and supplies used in the conduct of such business; also fruits, vegetables, farm products, poultry, and sea food, in the respective seasons of their production". Objection was made by applicant on the ground that the Commission had exceeded its powers in fixing the limitations contained in the order, but the order was later accepted. Thereafter, the Commission began entering orders containing similar language in other applications covering service for the company, one of which was the original order in the Keystone case. The Commission had not, up to that time, even in the Keystone case, found any warrant in the law for the designation of the shippers or types of shippers the carrier may serve.

However, objections were filed by the common carriers, principally rail carriers, alleging that the operating authority granted to the applicants was too broad and should be restricted to authorize operations under *special* or individual contracts with *only such persons who operate retail stores, the chief business of which is the sale of food.*

The protesting common carriers further contended that the term "business of the contract carrier" as used in section 209 (b) means the precise operation conducted. This contention, however, has been set to rest by the decision in the case of *U. S. v. Caroline Freight Carriers Corporation*, 9 Sup. Ct. Rep. 722-727-729, in which this Court held:

> "This Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To

freeze them into the precise pattern of their prior activities as was done here not only may alter materially the basic characteristics of their service; it also may well be tantamount to a denial of their statutory rights."

The contract carrier applicants as a whole maintained that the Act was designed to give them a standing in the transportation world equal to that accorded motor common carriers. That view is supported by the following language of the "National Transportation Policy" added to the Amendment of 1940 to the Act:

"It is hereby declared to be the national transportation policy of Congress to provide for fair and *impartial* regulation of *all* modes of transportation subject to the provisions of this act, *so administered as to recognize and preserve the inherent advantages of each;* * * *." (Italics ours.)

Where an important Act is preceded by a declaration of policy, such policy becomes a guide to the construction of the terms and provisions of the Act itself.

The contentions of the applicants in the Keystone case is further supported by the decision of this Court in the case of *U. S. et al. v. V. L. Rosenblum Truck Lines, Inc.*, 62 Sup Ct Rep 445, which was analogous to the Keystone case in that the carriers were not independent operators serving the public but in effect private carriers who only served certain common carriers, and in which this court held:

"The Act clearly contemplates that contract and common carriers will offer competing types of service."

The applicants further contended that specifications in permits of the shipper or shippers to be served are unlaw-

ful and would destroy the contract carrier, and that if a contract carrier loses his contract or contracts held at the time the permit is issued, he, if limited to the transportation of named commodities for a certain shipper or a class of shippers, would be forced out of business, a thing clearly not contemplated by the Act.

Clearly then, while, even in its initial order in the Keystone case, the Commission held to its former interpretation of Section 209 (a) and (b) in the Act, that it definitely had no authority, in specifying the "business of the carrier and the scope thereof", to restrict the service of the carrier to certain shippers or types of shippers; nevertheless, having evidently become common carrier minded by reason of its dealing almost exclusively with railroads (common carriers) from 1888 when the Commission was established to 1935 when the Motor Carrier Act was passed, was undoubtedly impressed by arguments and objections of the competing common carriers to its initial order in the Keystone case and thus conveniently reversed its former interpretation and amended its initial order so as to restrict the Keystone carriers to service, not only as to the commodities to be transported and routes or territory to be covered, but also as to certain shippers or types of shippers the carriers may serve.

Yet, the Commission itself, conceding that the Keystone case presented an unusual situation in contract carriage, expressed some uncertainty as to the legality of the reversal of its former interpretation of the law. It said:

> "It does not follow that we are required to include in each and every permit a rigid or technical summary for defining the transportation business covered thereby or the scope thereof."

By what logic, or on what legalistic grounds the Commission applied that interpretation to appellant's case is certainly not clear. The facts in appellant's case are very dissimilar from the facts in the Keystone case. The status of the carrier was different. The operation was different. His was a status and an operation more analogous to that in the Longshore case. His was a strictly bona fide "grandfather" operation whereas in both the Longshore and Keystone cases the operation was not. The grant of his permit was a matter of right and not subject to the restrictive procedure in Section 209 (b) of the Act. His "grandfather" operation could not be restricted in the permit to the precise pattern of his prior activities, which restriction might be warranted in certain cases of new or extension operations.

In the Longshore case, the applicant sought a permit to operate as a contract carrier by motor vehicle of steel, steel products and materials and supplies used in the operation and maintenance of steel plants. Applicant had a contract with the American Rolling Mill Company to transport the commodities named from and to points described in the application. Trunk-line rail carriers and Barker Motor Freight, Inc., opposed the granting of the application.

They contended that applicant's service, if authorized, should be limited to transportation for the American Rolling Mill Company, more especially because applicant indicated a willingness to accept such limitation. However, the Commission refused to limit the transportation as requested, and refused to limit the operation to service for steel plants, on the ground that proper construction of the law did not give the Commission any authority to make such restriction; stating:

"The 'scope of the permit' as used in this section, relates to the routes or territory which the carrier may serve and to the commodities which it may transport *and not to the shipper or shippers to whom it may render its service.*" (Italics ours.)

The Commission found, the Longshore case, that the applicant owned two tractors and two 18-foot trailers of 10 and 12 tons capacity respectively; that he has operated at a profit in this service, is financially able to carry on his operations, follows good operating practices, holds a permit from the State of Ohio, is fit, willing and able properly to perform the service and to conform to the Commission's requirements, rules and regulations and that the operation will be consistent with the public interest and the policy declared in Section 202 (a) of the Act.

Appellant's status as a contract carrier and his "grandfather" operation, though encompassing a larger territory and a wider range of commodities, are similar to the status and operation of the carrier in the Longshore case; in fact, being a "grandfather" operator, appellant's status and operation, under the "Grandfather" Clause of Section 209 (a) are to be given a more liberal interpretation and a more comprehensive sphere. Appellant was in the general trucking business prior to the crucial "grandfather" date as both a contract carrier over irregular routes and an irregular carrier of general commodities (with exceptions) over a regular route within the described territory. Unlike the carriers in the Keystone case who were merely employees, as truck drivers, of a private concern, and who operated company-owned trucks and were not in business for themselves, he was an independent, individual operator who himself had built up his business, owned and operated his

own equipment and had constantly, at great expense, added to that equipment and to his facilities and personnel as the development of his business and the demands of the public required. He held an operating permit as an irregular carrier of general commodities from the State of Wisconsin (Rec. 334). His *main* or *principal* operation was set forth in his application to be that for Swift and Company, Libby McNeill & Libby, Plankinton Packing, *and others*, and the products he transported consisted of commodities generally, meats and packing house products specially.

To state these facts should indicate plainly the similarity of appellant's operation to that in the Longshore case and the dissimilarity to the Keystone case. Yet, in appellant's case, the Commission adopted the general form of authority used in the Keystone case, and not only materially restricted the commodities he transported and the territory he covered in his "grandfather" operation, but limited his service to certain shippers or types of shippers (R. 22-23). Appellant contends that this was an arbitrary and capricious restriction on the part of the Commission and a flagrant abuse of its power under the "Grandfather" Clause of the Act (Sec. 209(a)). Congress had definitely prescribed the tests and standards for determining the business of a contract carrier and the scope thereof in his "grandfather" operation and in issuing permits thereunder and the Commission was not warranted to ignore the clear intent and language of Congress by arbitrarily adopting tests and standards of its own in that determination.

In *U. S. et al v. Carolina Freight Carriers Corp.* (supra), this Court held:

> "There is no statutory warrant for applying to irregular route carriers a different or stricter test as to

commodities which may be carried than is applied to regular route carriers, * * * The statutory difference is only in the territorial scope and pattern of the operation."

In that connection, it is pertinent to point out that Commissioner Lee, who has had long public service on the supreme court of his state, dissented from the finding and conclusions in the Keystone case, especially with reference to the Commission's arbitrary assumption of power to so narrowly define the business of the contract carrier.

Commissioner Lee pointed out that *after much study*, the Commission had, prior to the Keystone case, concluded, as to "grandfather" operators, that they should be granted authority to continue the operation they were conducting on the "grandfather" dates, both as to territory and commodities transported; that, if a carrier had, for instance, been transporting stoves or clothing over the route or within the territory where he was operating on July 1, 1935, he should be permitted to continue to haul stoves or clothing for any person who had stoves or clothing to haul over his routes or within his territory. He stated that the Commission has *literally in thousands of cases* adhered strictly to that established policy, and that now, for the first time (in the Keystone case) the majority departed from that well-established policy and not only limited some contract carriers to certain commodities over specified routes or within defined territories, but also limited the service of these carriers to restricted, particular shippers. He said:

"They can haul potatoes, but not for the farmer who grows them; they can haul flour; but not for the miller who grinds it; they can haul canned goods, but not for

the canner. It is worthy of note here that the individual retail grocery store ordinarily does not ship freight; it is usually a receiver thereof. Consequently, insofar as these carriers are concerned, in the final analysis it is the chain store only, the A. & P. and the like, with whom they will be allowed to deal. It is my view that these carriers should be authorized to contract with anybody who has such shipments to be hauled within their respective territories. Limiting a carrier to transportation for particular shippers is a good deal like saying that a farmer must sell his product only to a certain class of persons. The practical effect of this decision is that the contract carrier must continue to secure business from a chain grocery company or go out of business. In some situations there may be two or three chain groceries in the territory, with which such carrier may exercise his valued right to contract, but in other cases there may be only one."

In further expressing his disagreement with this new and unauthorized interpretation and policy, and in upholding the sound and liberal construction of the Act contemplated by Congress and adopted in the Longshore Contract Carrier Case, supra, the Commissioner said:

"It is sought to justify this new doctrine largely on the ground that it is necessary to protect common carriers. However, the price of such protection would be too high, even if common carriers required it. Instead of it being the patent object of Congress to protect common carriers, I prefer to construe the law to mean that Congress intended that we deal evenly with both classes of carriers. The law does not, as argued in the report, authorize the protection of common carriers at the expense of contract carriers. Section 218 (b) merely prohibits us from giving any preference or advantage to contract carriers in their competition with com-

> mon carriers. What the law contemplates is that we shall so regulate the two classes of carriers as to preserve the benefits to the public from each. Under the act, this is to be accomplished primarily through the prescription of maximum and minimum charges for contract carriers. I insist that there cannot be spelled out of the act any intention on the part of Congress that contract carriers should be hamstrung for the benefit of other carriers."

We contend that this dissenting opinion expressed accurately the declared policy of Congress in the passage of the Act and interpreted correctly the provisions of the Act relating to the case at bar. This Court, in the *U. S. vs. Carolina Freight Carrier Corp. Case*, emphasized and practically affirmed that liberal construction.

While Commissioner Lee concurred in the particular finding of the Commission in appellant's case, to-wit: That appellant is entitled to a permit authorizing transportation of canned *goods* (a more comprehensive term than canned foods as used by the Commission), fresh meats, dairy products, packing house products and supplies, he did not concur in the restriction of the carrier's service to certain shippers or class of shippers (R. 24). His dissent from that restriction is therefore indicated.

To have refused to restrict the service of "literally thousands of competing contract carriers" to certain shippers or types or classes of shippers, under the interpretation of the law adopted by the Commission in the Longshore case, and now to insist on that restriction in appellant's "grandfather" case and in other contract carrier cases, is an unfair and prejudicial discrimination by the Commission between contract carriers themselves.

Appellant was, as stated, in the general trucking business as a contract carrier. He was gradually building up his business, and had acquired equipment for some time prior to his contract with Swift & Company. So also, prior to the Swift contract, he secured a permit from the State of Wisconsin for the transportation of general commodities. His subsequent contract with Swift & Company, Libby, McNeil & Libby and with Kraft Cheese Company prior to the effective grandfather date, were separate, individual contracts that merely emphasized and more clearly established his status as a contract carrier in his general trucking business. He could, prior to the effective date, transport property, with or without individual contracts with shippers. His applications for a permit and certificate, Docket Nos. MC 70830 and 70831, which were subsequently combined into one application, Docket No. MC 70830, were not applications merely for a permit and certificate to haul under special contracts only certain commodities and for special shippers or classes of shippers, but were predicated upon "grandfather" rights acquired in his territorial operation in his general trucking business. As a motor carrier of property, he had the right, even prior to the enactment of the Motor Carrier Act, to substitute or add as many contracts as he pleased and to add to his equipment and facilities as the development of his business and the demands of the public required. The Motor Carrier Act, by the proviso in Sec. 209 (b), merely confirmed his rights in that respect.

In a recent "grandfather" decision by this Court, in *Gregg Cartage and Storage Co. v. U. S. and Interstate Commerce Commission*, 63 Sup. Ct. Rep., 932, while an entirely different issue was there presented than presented in the case

at bar, being an issue on the question "whether, under Sec. 209 (a) of the Act, the bankruptcy of a carrier was an interruption of service over which the applicant had no control, and in which the Court decided that he had such control, the language of the dissenting opinion of three Supreme Court Justices, namely, Justice Douglas, who wrote the majority opinion in the *Carolina Freight Carriers Corp.* case and Justices Black and Byrnes, are very pertinent to this proceeding. They said:

> "Congress has provided that those who attained a position in the competitive transportation system should be allowed to retain the fruits of their struggle. We could not permit those statutory grants to be whittled away on the basis of technical and legalistic grounds which find no expression in the statute, however much the administrative chore may be alleviated."

The findings of the Commission set forth the fact that appellant did transport, prior and subsequent to July 1, 1935, *a wide range of commodities*, not confined to "canned foods, fresh meats, dairy products and packing house products and supplies" (R. 21). To confine appellant to the transportation of these products and restrict his service to certain classes of shippers whom he served during the "grandfather" period, when a large number of these products are not products of these particular shippers at all, is an unreasonable and preposterous restriction that materially abridges the appellant's "grandfather" operation.

The language of Circuit Judge Parker in the *Carolina Freight Carriers Corp. case* in the Circuit Court, Vol. 38, No. 3, Fed. Supp. p. 554, is pertinent to these observations. He said:

"'Grandfather' clauses are quite customary when the state first undertakes the regulation of an industry or profession; and so far as we are advised the position taken by the Commission with respect to these cases is quite without precedent. It is just as though a physician entitled to continue his practice under the 'grandfather' clause of a statute regulating the practice of medicine should be told that he could practice only in homes which he had formerly visited in his practice and would be allowed to treat only the diseases which he had formerly treated. We feel perfectly sure that if any such interpretation of the act had been suggested at the time of its consideration by Congress, it never would have been passed."

Under the disputed Order of the Commission, plaintiff is, for instance, permitted to haul butter for Swift & Company, but cannot haul butter for Libby, McNeil & Libby unless it be canned. He can transport peanut butter, sandwich spreads, mayonnaise and salad dressing for a packing house but cannot haul them for anyone else unless they are canned. He can haul canned goods for persons who operate merely food canneries, but cannot even haul canned foods for Derby Foods, Inc., not a cannery or a packing house, and yet a subsidiary or affiliate of Swift & Company, included in the Swift & Company contract, and for whom plaintiff has transported many other foods prior to July 1, 1935. He can haul fresh meats for a packing house, but cannot haul it for any meat or sausage concern unless it be a packing house. Such arbitrary and unreasonable restrictions in the Commission's order are, to say the least, legally, logically and economically unsound.

Even the language in the Commission's findings and order is vague and indefinite. For instance, no doubt the Commission intended that, insofar as appellant's contract with Libby, McNeil & Libby is concerned, he shall be permitted to haul all commodities produced and used by Libby; yet, under the restrictive language employed, he cannot transport anything but canned foods for that concern or, for any other food cannery. The war emergency has materially curtailed the manufacture and transportation of canned foods, and if such foods shall be prohibited entirely, the appellant could transport no commodities whatsoever for Libby, McNeil & Libby, or any other food cannery.

THIRD POINT

If the restriction of the carrier's business and the scope thereof to certain shippers or types of shippers be nevertheless held authorized, the designation of the shipper's business cannot be capricious or arbitrary but must embrace the entire scope of the business of the shipper and of the shipper's subsidiaries, and not merely a major product or special branch of their business, especially when the carrier's contract calls for the transportation of ALL of the products of the shipper and of his subsidiaries as directed, and the carrier was transporting such products on July 1, 1935, and continuously since.

In the Keystone case, the Commission broadly and comprehensively classified the shippers, American Stores Company and Great Atlantic and Pacific *Tea* Company as *general foods products concerns*. However, in appellant's case, after denial of any and all timely petitions of appellant for review, oral argument or reconsideration to deter-

mine, among other things, the general business of the shippers he served, namely Swift & Company and Libby, McNeill & Libby, and Kraft Cheese Company, who are all general foods products concerns and the subsidiaries and affiliates of these companies, and, without making specific findings as to what standard the Commission adopted for determination of the classification of these shippers, the Commission unreasonably, arbitrarily and unlawfully defined the shippers by the narrow designation of a special branch or major product of their business, designating Swift & Company as merely a "meat packing business", and Libby, McNeill & Libby as merely a "food cannery", and thus limited appellant's permit to persons who operate food canneries or meat packing houses. Thus the Commission destroyed the parity between appellant's future operation and his prior *bona fide* operation which the statute was designed to preserve.

Swift & Company, by its very Articles of Incorporation, in effect since 1917, and which were in evidence in the lower Court as plaintiff's Exhibit F, is a *general food products concern* (R. 330A-332), and has, since that time, continuously operated as such. In fact, those Articles list as the first object for which the company was formed: "to manufacture, buy, sell and deal in and with any and all foods." Its second object is stated to be "to manufacture, buy, sell and deal in and with any and all materials, articles, commodities and things which may be manufactured and converted into *foods or the by-products thereof*." The slaughtering of animals and conversion thereof into meats is only the third object stated. So also Libby, McNeill & Libby and Kraft Cheese Company, are general food products concerns, even though, as to the latter concern, the

word "cheese" forms part of the firm name, just as the word "tea" forms part of the firm name of the Great Atlantic & Pacific Tea Company.

Congress never intended to give the Commission unlimited power, in determining the "business of the contract carrier and the scope thereof" to restrict that business and scope to such narrow, arbitrary and unreasonable limits as are contrary to and inconsistent with the comprehensive definition of the *business* of the carrier given by Congress itself in the Act.

There has been no change or amendment in the law warranting a different interpretation. In fact, the 1940 Amendment of the Act strongly supports the interpretation given the Act in the Longshore case. As heretofore stated, the original Act, Sec. 203 (a) defined the business of a "contract carrier by motor vehicle" by designating such carrier as any person which, under *special* and individual contracts, or agreements, engages in the transportation of passengers or *property* in interstate or foreign commerce for compensation. The Amendment of 1940, in Sec. 203 (a) of the Act omits the word "*special*" with reference to the carriers' contracts and thus clearly re-affirmed the interpretation it intended in the first place and which the Commission had given the Act before the Keystone case, namely, that a contract carrier shall be considered to be in bona fide operation under individual contracts without *special* or *specialized service* to particular shippers. By that intentional omission in the Amendment of the Act, Congress gave its disapproval of the Commission's restrictive interpretation of the Act in the Keystone case, and, indicated clearly again that it withheld from the Commission the

power to designate the business of the carrier and the scope thereof by predicating it upon *special* contracts with or *specialized* service for certain shippers or class of shippers. Congress also, by that omission of the word "special" sought to wipe out and did wipe out the preference in business or protection the Commission contended, in the Keystone case, the common carriers should have.

Moreover, the Commission in its order and the U. S. District Court in its decision erred in failing to set forth or make any material reference to the ten or more subsidiaries and affiliates of Swift and Company and of Libby, McNeill & Libby, some of which, such as Derby Foods, Inc., also are general food products concerns which appellant, during the "grandfather" period, was not only obligated by contract to serve but did actually serve. Many of those subsidiaries and affiliates are in no sense "meat packing businesses" or "food canneries" or "cheese processing businesses", either in their primary business or incidental business. If a classification of the shippers be held to be authorized in the law and to be a necessary part of the specification of the business of the contract carrier and the scope thereof, then under the very provisions of appellant's contracts with and transportation for shippers, prior, on and subsequent of July 1, 1935, the business of all these subsidiaries and affiliates should have been also separately defined and classified and included in the grant of authority to appellant by the Commission. Otherwise, the Commission could resort to even a more drastic interpretation of the Act by further restricting appellant's business as a contract carrier and the scope thereof to an operation for only meat-packing businesses or food canneries *who have*

ten or more subsidiaries, or who have *no subsidiaries*, and thus practically confine his "grandfather" operation to an operation for Swift & Company only, or to an operation for some minor enterprise. To restrict a carrier's business to certain shippers or types of shippers, and especially to classify the business of shippers, in that connection, within the most narrow bounds by basing that classification on merely a major product in which the shipper deals, or on some special branch of his business is not only not warranted in law, but is utterly repugnant to the American way of living and of doing business, destroys individual initiative and enterprise, and subjects such carrier to the will of the shippers in his contractual business relations with them in that he must deal with these particular shippers or have no business at all.

As hereinbefore indicated, the Motor Carrier Act, Section 203 (a) (15), specifically defines the *business* of the motor carrier as either a carrier of *passengers* or a carrier of *property* and nowhere in the Act is that business defined as an operation for certain shippers or class of shippers.

Likewise, in the law, reference is made to both regular and irregular route carriers, and to the territory in which the carrier has operated or is to operate. (Secs. 203 (a) and 209 (a)).

The word "scope", as used in the Act, especially in Section 209 (b) of the Act, is the only word upon which the Commission can predicate its findings as to the *extent* of the carrier's business, which extent must be considered in relation to the Congressional definition of the carrier's business as either a carrier of passengers or a carrier of property, and the territory he serves as either a regular or irregular route carrier, or both.

There is nowhere in the law any authority or power given the Commission to go beyond a limitation as to passengers, property or territory of the carrier, or as to whether he is a regular-route carrier, or irregular route carrier, in his operation under his "grandfather" status.

The lower Court erred in holding that the scope of the business of the carrier has reference to his *individual operations*, stating:

> "Manifestly the intention was to vest in the Commission broad powers to determine and specify in the permit, by the use of adequate language to do so, the extent of the operations in which the Carrier might engage. The word 'scope' is a comprehensive term as used in the Act and is for the purpose of enabling the Commission to prescribe a limited or an extensive range of *operations* in accordance with the rights of the carrier as determined by the character and extent or the service furnished on July 1, 1935" (Rec. Doc. No. 7, p. 11). (Italics ours.)

There is nothing in the language of the Act to warrant such interpretation. The language of the Act is plain and simple as the lower Court itself has said (R. 341). It is not subject to the interpretation given it by the lower Court. The language clearly and simply sets forth that the Commission shall specify in the permit the *business* of the carrier and the *scope thereof*, and not his individual operations and their scope.

If there be any ambiguity in the law, Section 209 (b), reference in clarifying that ambiguity and disclosing the true intention of Congress is had to discussions and hearings by Congress on the Bill before its passage.

When the Bill, which later became the Motor Carrier Act, 1935, was placed before the Senate Committee on Interstate and Foreign Commerce by Commissioner Eastman, who was then Federal Coordinator of Transportation, Section 209 (b) provided that:

> "The Commission shall specify in the permit the *operations* covered thereby and the scope thereof * * *"

The Senate Committee eliminated the word "operations" and substituted for it the "*business* of the contract carrier."

This change made by the Senate Committee shows clearly that Congress did not intend that the Commission shall specify, in the permits of contract carriers, the individual operations conducted on the "grandfather" date, but rather that the Commission shall specify, in the permit, a comprehensive statement of the *business* in which the carrier was engaged, under the classification set forth by Congress itself, as either a carrier of passengers or carrier of property and as a regular or irregular route carrier.

If any doubt exists that this was the true intent of Congress in making the change, the following statement made by Senator Wheeler on the floor of the Senate in explanation of this change certainly clarifies that doubt.

> "* * * This section (referring to Section 209) has been changed in lines 19-22, page 27, to make clear that the bill applies to the *business* of contract carriers and not merely *operations* under the individual contracts." 79 Cong. Rec. 5654. (Italics ours.)

If Congress had intended to restrict the business of the carrier to his individual operations and related operations, it would have used a restrictive word such as "limits" or

"limitations" thereof. Congress, however, instead used the word "scope". The word "scope" in its natural and usual meaning and as defined by Webster is certainly not a restrictive term. It is an all-comprehensive term, and means "amplitude of opportunity"; "free course or vent"; "range"; "length"; "extent"; "sweep". As used in the Motor Carrier Act "The business of the carrier and the scope thereof," it is relative term. The Commission is to state in the permit of the carrier, the "scope of the commodities" carried, and the "scope of the territory" covered. If it now be held as was held by the Commission in the Keystone case, that the classification of the shipper also comes within the meaning of the word "scope", though no amendment of the law has directly or by implication made that inclusion, then also, where appellant's contract called for transportation of any and all of the shipper's products as directed, the *entire scope* of the shipper's business the "extent" thereof, the "sweep" thereof, is to be stated, and not his business given a very restrictive classification by simply designating, as the shipper's business, a major product he deals in, or a special branch of his business. Such a narrow classification of the business of the shipper circumscribes the carrier's "grandfather" rights to a mere semblance of his bona fide "grandfather" operation.

FOURTH POINT.

Appellant's bona fide "grandfather" operation was a TERRITORIAL operation, carried on between all points and places in said territory as directed by the shippers.

a) The fact that a commodity of the shipper has never or only sporadically been transported between certain points in that territory does not warrant withholding of authority so to do, and the Commission exceeded its power in restricting the territorial operation of appellant to transportation FROM certain designated points in that territory TO points of destination therein.

The Commission, in its findings, stated as to appellant's contract with Swift & Company in November, 1934:

> "Under the agreement, applicant's two trucks were placed at the exclusive disposal of Swift and its subsidiaries for use *within its South Saint Paul trade or shipping area, and also out of its Chicago Plant*, and applicant hauled truckloads of 'plant sales' under seal from South St. Paul plant to Swift branch houses and to certain break-bulk points, where the commodities were unloaded for subsequent local delivery or reshipment to consuming points by local truckers" (R. 16).
>
> "Applicant's *principal* operations have consisted of rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul for delivery to Wisconsin points, following which the truck proceeds to Chicago or Blue Island to pick up loads at the plant of Swift and Libby, respectively, for delivery into Minnesota" (R. 17). (Italics ours.)

The Commission, failed to set forth the important and pertinent facts, that appellant was in the general motor

transportation business prior to November, 1934, and that Swift, Libby and Kraft contracts were simply operations that were part of his contract carrier business, though they may have developed into major operations in that business. The Commission also erroneously predicated its restriction to service for certain shippers upon *specialized* service rendered these major shippers.

We have already heretofore shown that Congress, by the amendment of the Act in 1940, eliminated "specialized" service as a factor in determining the rights of contract carriers with respect to their "grandfather" operation.

The lower Court, in its findings upon the record, set out the facts of the case more clearly and accurately, as follows:

> "The plaintiff (appellant) began a motor carrier transportation business in September, 1934, when he obtained a common carrier permit from the State of Wisconsin for the transportation of general commodities *between* Chicago, St. Paul and Minneapolis. In November, 1934, he entered into a contract with Swift & Company for the carriage of merchandise for that company and its affiliates *in the trade territory of its South St. Paul packing plant which required him to operate between points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota.* Proper licenses and permits were issued by the various states for these operations. A similar contract was made by plaintiff in February, 1935, with Libby, McNeil & Libby, and *under his common carrier permit, he transported general commodities.* The plaintiff, June 1, 1935, made a contract with the Kraft Cheese Company for transportation of its products *generally* westward from Green Bay, and Plymouth, Wisconsin, and northward from Chicago and Freeport, Illinois" (R. 333-334). (Italics ours.)

On the face of the findings of both the Commission and the lower Court, it is quite clear that appellant's operation was definitely a territorial operation, and not one merely from and to fixed termini. The Commission found that his operation was *within the Swift & Company South St. Paul trade or shipping area and also out of its Chicago Plant.* The lower Court found that the territorial extent of his operation for Swift & Company and its affiliates was *in the trade territory of its South St. Paul packing plant which required him to operate between points in Minnesota, Wisconsin, Iowa, Illinois and North Dakota.* His contracts provided that he must transport any and all the products of the shippers and their subsidiaries in this territory as directed. He did, during the "grandfather" period, transport, and has continuously transported these products within the designated territory as directed, over irregular routes (R. 68-69). That, the appellant, during the "grandfather" period, did not transport all of the shipper's commodities, or those he did transport, to all points in his territory, does not warrant a restriction of his future operation to the precise points or area he served.

In *Alton Railroad Co. v. United States*, 62 Sup. Ct. Rep., 432, this Court said:

> "'Territory' is not a word of art, and the characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial scope of the operation which may be authorized under the 'grandfather' clause. * * *"
>
> "While the test of a 'bona fide' operation within a specified territory includes 'actual rather than potential or simulated service', it does not necessarily restrict future operation to the precise points or area to be served."

In the case of *U. S. v. Carolina Freight Carriers Corp.* supra, this court, in holding that the same tests and standards that applied to a regular route carrier must also be applied to an irregular route carrier, further held:

> "If the applicant has established that he was in 'bona fide operation' during the critical periods *in a specified territory*, restrictions on commodities which could be moved in any one direction *or between designated points* would not be justified. The fact that a particular commodity has never been transported between certain points in that territory would not mean that authority to haul it between them should be withheld. • • • For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their activities as was done here not only may alter materially the basic characteristics of their service; it also may well be tantamount to a denial of their statutory rights." (Italics ours.)

That the Court's ruling applies as well to a contract carrier as it does to a common carrier, and even with greater force to the former, is obvious for the reason that a contract carrier who has entered into a contract to transport the shipper's products between any and all points in a designated and prescribed territory and is operating under that contract, is already presently obligated to cover the territory as directed while a common carrier's coverage of his territory is dependent on his future anticipated patronage.

We maintain therefore that, in the face of the Commission's and the lower Court's own findings, it was error to restrict appellant's "grandfather" operation from certain

designated points within his territory to points of destination.

FIFTH POINT.

In determining the business, and its scope, of a contract carrier who was in bona fide "grandfather" operation as both a general contract carrier over irregular routes within a designated territory and an irregular carrier of general commodities over regular routes within the same territory, the latter operation, if carried on to provide the carrier with a balanced operation and a profitable backhaul movement is not such a dual operation as is prohibited by Sec. 210 of the Act.

The lower Court, found, as heretofore stated, that "appellant began his motor carrier transportaiton business in September, 1934, when he obtained a common carrier permit from the State of Wisconsin for the transportation of general commodities between Chicago, St. Paul and Minneapolis; that under certain contracts with Swift & Company, Libby, McNeil & Libby and Kraft Cheese Company, he transported their products in his territory, and, under his common carrier permit, he transported general commodities" (R. 333-334).

Appellant has always been engaged in a balanced operation and he never at any time contemplated or intended to operate his motor vehicles empty or partially empty in any direction. Only a balanced operation can be economically sound, and is in harmony with the spirit and intention of the national transportation policy and the provisions of the Act.

The war situation has forcibly emphasized the economic necessity and importance of a constant substantial return load in the motor carrier service of today. The vital need of conservation of motor equipment as well as the economic importance of avoiding delays in transportation has become pronounced.

The Commission found that, prior to July 1 and through October 15, 1935, applicant's operation was predominantly *to* Chicago and Milwaukee, to which there have been numerous shipments (R. 18). The operation for Swift and for Libby alone did not however provide for appellant a profitable back-haul, and appellant transported general commodities from Chicago and Milwaukee to the Twin Cities area to meet that deficiency, and the lower Court found this as fact.

However, the Commission, while finding that appellant had transported a wide range of commodities from Chicago to the Twin Cities (R. 21-22), restricted him to fresh meats, canned foods, dairy products and packing house products and supplies in his operation from Chicago to St. Paul, Minneapolis, South St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minnesota, and La Crosse, Wisconsin, over irregular routes (R. 23). The lower Court erred in affirming that restriction (R. 349).

Appellant's operation of general commodities over a regular route from Chicago and Milwaukee to the Twin Cities area was necessary in providing him with a profitable back-haul in his service to Chicago and Milwaukee, and, under a liberal construction of the Act should have been authorized by the Commission without the restriction imposed. A contract carrier is entitled to a profitable back-haul as is a common carrier, and to deny him that right violates

the national transportation policy of "providing for fair and impartial regulation of all modes of transportation" and for "preserving the inherent advantage of each," and is an unwarranted discrimination in favor of the common carrier. The lower Court held, as to the rights of contract carriers versus common carriers: "There should be no discrimination between carriers" (R. 344).

In *U. S. v. Carolina Freight Carriers Corp.*, supra, where a similar issue of profitless back-haul was involved, this Court held:

> "To appellee such matters involve life and death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. A restriction in this case of the commodities which may be carried from any point in southbound trips is a patent denial to appellee of that 'substantial parity' between future operations and prior bona fide operations which the Act contemplates. Its *prior opportunity* should not be restricted beyond the clear requirement of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system." (Italics ours.)

Section 210 of the Act provides that "for good cause shown" the Commission may issue both a permit and certificate if it finds that both may be held consistent with the public interest and with the policy declared in Section 202 (a) of this part. The "consistency" referred to is not consistency with the interests of competing common carriers but consistency with the *public* interest. In other words, it is a consistency that is advantageous or of benefit to the public.

In the case of *Scott Bros. Inc. Collection and Delivery Service*, MC 2744; 1 Fed. Carrier Cases (7089) 70, 73, the Commission itself held:

> "In determining the question of consistency with the public interest, it is essential that we form some conception of the meaning of that phrase as used in the statute. The phrase is used in several places in the act. In Section 213, it is used in contrast with the phrase 'promote the public interest'. It follows from this use that its true meaning is that of 'not contradictory or hostile to the public interest'. * * *
>
> With this conception of the meaning of the phrase, we are of the opinion that the proposed operations are not hostile to the public interest and that in point of fact by *rendering more flexible the rendition of the proposed service and affecting economies both in time and money*, the public will ultimately receive benefit from the rendition of them by this carrier." (Italics ours.)

SIXTH POINT.

The statute (Sec. 209 (a)) provides that there shall be included in the permit for the continuance of a "grandfather" operation any regular or seasonal service in which there was an interruption on July 1, 1935, over which the carrier had no control; and therefore appellant's service for Kraft-Phenix Cheese Company, now known as Kraft Cheese Company, under contract entered into prior to July 1, 1935, was improperly excluded from appellant's bona fide "grandfather" operation.

The Commission refused to consider the Kraft Cheese Company contract service part of appellant's bona fide "grandfather" operation, and, over the objections and ex-

ceptions of appellant, excluded all testimony with reference thereto, on the ground that actual transportation of the company's products did not commence until after July 1, 1935. The lower Court erred in affirming that refusal and exclusion (R. 344-345).

In appellant's case, there was on and prior to July 1, 1935, an actual and admittedly valid contract existing between the appellant and the shipper which contract was made in pursuance of appellant's general trucking business, both as a general contract carrier and as an irregular carrier of general commodities. The execution of that contract was in itself the initial *service* to the shipper, as it was negotiated only after considerations and settlements as to rates, necessary equipment and increased personnel to be furnished and territory to be covered. Appellant did add materially to his equipment and personnel, at great expense, for the purpose of carrying out the contract with the Kraft Cheese Company, and was obligated and stood ready at all times from the execution of the contract to transport the Kraft Cheese Company's products when and wherever directed by that company in and within his territorial area. The Kraft Cheese Company itself, not the appellant as carrier, undertook, after the execution of the contract, to make a new arrangement in its method of distribution which caused an interruption of *service* beyond the control of the appellant until after July 1, 1935 (R. 304-315). Under Sec. 209 (a) of the Act, such interruption of service in a "grandfather" operation, does not place that service outside the realm of the carrier's "grandfather" operation, but the service contracted for is to be included in that operation. The word "service" as used in that Sec-

tion is a broader term than mere "transportation", "hauling" or the like. It may well include the "assumption of a contractual obligation" and the "preparations" made by the carrier for the benefit of the shipper, to fulfill that obligation. The shipper, by that *service*, is relieved from further negotiations and the execution of a contract with someone else. This interpretation is supported by the decision in *U. S. v. Carolina Freight Carriers Corp.*, supra, where the Court held that the Act should be liberally construed and the carrier's prior opportunity should not be restricted beyond the clear requirements of the statute.

The Act itself, Sec. 203 (a) (19), by its very language, in defining the words "services" and "transportation" clearly supports that liberal construction of the word "service" as used in Sec. 209 (b) with reference to "grandfather" operations, and plainly indicates the intent of Congress that it shall be liberally construed. That Section provides:

> "The 'services' and 'transportation' to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all *facilities* and property operated or controlled by any such carriers and used in the transportation of passengers or property in interstate or foreign commerce or *in the performance of any service in connection therewith.*"

The word "interrupt" in its natural, reasonable, and popularly accepted use means not only "the stopping of something that has commenced". It means also "to hinder the performance of", or "to defer because of some contingency". For instance, a planned marriage may be interrupted for some time by the illness of one of the parties.

A planned building project may be interrupted pending favorable weather conditions. The word "interrupt" in any liberal construction of the Act, must be given its broad, reasonable and comprehensive meaning, and given that meaning, it is apparent that the delay in transportation under the *bona fide* contract with Kraft was an "interruption" of service over which the appellant had no control, and which, under Sec. 209 (a) of the Act, brings the Kraft operation within his bona fide "grandfather" operation.

We contend that, when a person, in the general trucking business, under "grandfather" operation, enfered into a bona fide contract to transport property for a shipper, that contract, and the contractual obligation he assumed thereunder, immediately became part and parcel of his "grandfather" operation.

It is significant to note that the language of Sec. 209 (a) is not "interruptions of *operations*" or of *transportation*, but "interruptions of *service*".

So also, the proviso of Sec. 209 (b), prohibits the Commission from attaching any terms to a permit that would restrict the rights of the carrier to add *contracts* or to add to his equipment and facilities. It would seem that, under a reasonable and natural interpretation of this proviso, and when read in connection with the definition of "service" in Sec. 203 (a) (19), any bona fide *contract* added prior to July 1, 1935, is a service that is part and parcel of the carrier's bona fide "grandfather" operation.

We maintain that appellant's case differs from those cases heretofore brought before this Court in which a mere potential or simulated service was held to be properly excluded from a bona fide "grandfather" operation.

In *Alton Railroad Co. v. United States*, 62 Sup. Ct., Rep. 432, the court held that "while the test of a 'bona fide operation' within a specified territory includes 'actual rather than potential or simulated *service*', it does not necessarily restrict future operation to the precise points or area to be served.'" (Italics ours.)

In *U. S. v. Maher*, 307 U. S. 148, there was no contract for a regular route service. The operation was held not to be identified with the carrier's bona fide "grandfather" operation as no regular route over which he sought transportation was in existence on June 1, 1935. Appellant, however, had a regular route and irregular routes when his contract with Kraft was made.

In *McDonald v. Thompson, et al.*, 305 U. S. 263, 266, the Commission denied the "grandfather" right of applicant to haul over Texas highways, not because there was no actual operation prior to July 1, 1935, but because the State of Texas had taken away the carrier's right to the proposed operations on the grounds that these operations subjected the highways to excessive burden and endangered and interfered with ordinary use by the public.

Gregg Cartage & Storage Co. v. United States, supra, involved a different issue than that presented in appellant's case. The Court merely decided in that case that "the bankruptcy of a motor carrier is an interruption of service within the control of the carrier."

While the Commission sets forth in its findings that appellant's operation for shippers other than Swift were performed in conjunction with the Swift operation (R. 16), it inconsistently contended before the lower Court that the Kraft contract was legitimately excluded from appellant's bona fide "grandfather" operation because the Kraft Com-

pany contract was not connected with the Swift contract, as Kraft is nationally known as a different business than Swift & Company, the Kraft Company being primarily a cheese manufacturer, and Swift & Company primarily a meat packer, and that cheese was merely an incidental product of Swift & Company. If that reasoning be sound, then canned foods should also have been classed merely incidental products of Swift & Company, and it should have been held with equal persuasion that appellant's contract with Libby, McNeil & Libby, included in the Commission's order as part of his bona fide operation, was also unauthorized.

So also, the Commission in its argument before the lower Court very ingeniously suggested that Appellant should not be disturbed about the exclusion of the Kraft contract from his bona fide "grandfather" operation because he could, if he wished, make application for an "extension" operation under Section 209 (b) seeking authority to serve the Kraft Cheese Company.

Pending the decision in this case, appellant filed an application with the Commission on January 31, 1941, for an extension of his operation to include the Kraft Cheese Company contract. While the Commission, on August 14, 1942, on said application, granted appellant authority to carry on his service under the Kraft contract, by determining that the operation of appellant "under individual contracts with persons who operate *cheese processing businesses* of dairy and similar food products and supplies" is lawful, we maintain that that operation for Kraft Cheese Company should have been included in appellant's "grandfather" authority. By not including it in that authority contrary to the provisions of the Act, appellant's "grandfather" rights have

been aborted, and his opportunity for further extensions materially jeopardized by reason of the well-known reluctance and delays by the Commission to grant further extensions and the strong opposition by competitors thereto.

Moreover, by again limiting appellant's operation in that respect to the special shippers or class of shippers the appellant may serve, namely, "cheese processing businesses", the same question is still at issue, in the Kraft operation, as to the power of the Commission, in specifying the business of the carrier and the scope thereof, to restrict him to certain shippers or class of shippers and to define the business of the shipper by the narrow bounds of only a major product he deals in, or by some special branch of his business.

SEVENTH POINT.

The denial to appellant of a fair hearing by the Commission and the irreparable injury that will result to appellant from the enforcement of the Commission's restrictive order deprives him of his property without due process of law and is repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States and the Statute.

The Commission based its findings and order upon its decision in the Keystone case, supra, stating that the same problem, with respect to defining the business of appellant and scope thereof, is here presented, and that therefore, in granting authority in appellant's case, it adopts the general form of authority used in the Keystone case (R. 22).

The lower Court found that the Commission report and order of May 13, 1941, in issue here, were made after a full hearing. This was error in the face of the fact that the

Keystone case, supra, was not *res judicata* and plaintiff was not a party thereto and had no notice thereof, and that the interpretation of the Act and the policy enunciated in that case were not the interpretation and the policy in force when appellant's application was filed and hearing had thereon. The Commission arbitrarily, prejudicially and unjustly refused to grant appellant's petition for oral argument, filing briefs, reconsideration and review of both the Recommended Order of December 5, 1939, and its final subsequent and far more restrictive Findings and Order of May 13, 1941—all of which deprived appellant of his property rights and his legal rights under the Motor Carrier Act (R. 3, 4, 24 and 25).

We maintain that these denials by the Commission do not constitute a fair hearing within the meaning of the due process clause of the Constitution. The "grandfather" right is in the nature of a Congressional franchise. It is a limited property right. At the time of the hearing in September, 1938, the Commission's Keystone case, supra, was not a part of the law of the case but it was subsequently made a part of the denial order of May 13, 1941, and in fact that order based upon it, although no record of facts had been made and that case has never been adjudicated by the entire Commission itself.

Counsel had no opportunity of showing by argument or brief why they believed Division 5's Keystone decision was both erroneous as a matter of law and was not applicable to the facts in the instant case. Such refusal does not conform to the judicial standards of a fair hearing required by the due process clause of the Constitution. Full and fair hearing has not been accorded this appellant. The

argument prior to the proposed or Recommended Order of the Trial Examiner did not follow, nor could have considered, the doctrine of the Keystone case as applicable to the facts and evidence. The Keystone decision had not then been rendered. It is further obvious, had the Keystone doctrine been *known to the* counsel at the time of hearing before the Trial Examiner in September, 1938, or had the Commission afforded appellant an opportunity for argument or rehearing, Counsel would not have had to resort to necessity of offering in evidence at the hearing before the lower Court the Articles of Incorporation of Swift & Company showing that it is more than a packing house, and is in fact a *food* concern.

There is nothing in appellant's application, or in the record, to indicate that either the appellant or the shipper were ever given notice or opportunity to show the scope, extent, range or sweep of the shipper's business, and the Commission made no findings upon which it could base a classification of the shipper, and particularly such arbitrary and restrictive classification of the business of the shipper as was made in appellant's case.

Th. Interstate Commerce Act, Part II, provides, Sec. 205 (b): "All the provisions of Section 17, of Part I shall apply to all proceedings under this part," and said Section 17, Sub. (6) provides for such rehearing. Even though the Commission may have discretion under said Sec. 17, Sub. (6) of the Act to "reconsider the matter" either upon the same record or after a further hearing, the denial of such further hearing under the circumstances here set forth constitutes a violation and abuse of that discretion which we think does not conform to the judicial standards of a fair

hearing. The issue here presented is one of "general transportation importance" within the meaning of Part I, Sec. 17, Sec. (b), of the Act. That Act indicates that the Commission's rules should be formed so that there shall be no arbitrary, capricious and unjust denial, especially without even an explanation, of appellant's petition for reconsideration or review, and that appellant be afforded either the opportunity of presenting oral argument or of submitting a complete and comprehensive brief on this vital phase of "general transportation importance". The case at bar falls within the doctrine of the case of *Morgan v. U. S.*, 56 S. Ct. 907 (May 25, 1936), declared by Justice Hughes (p. 911), to-wit: "The 'hearing' is the hearing of evidence and argument."

This Court, in the *Morgan Case*, set forth, in effect, that those who are brought into contest with the government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes, and to be heard upon its proposals before it issues its final command. The Court further said relative to such hearing (p. 777, 32 L. Ed.):

> "Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to these fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master of the trial judge permitted the appellant's attorney to formulate the findings upon the evidence, conferred ex parte with the appellant's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or

decree as having been made without a fair hearing. *The requirements of fairness are not exhausted in the taking or consideration of evidence, but extended to the concluding parts of the procedure as well as to the beginning and intermediate steps.*" (Italics ours.)

The hearing in the instant case is a close parallel to that afforded appellant in the *Morgan Case,* and as the Court there found the hearing fatally defective and the order of the Secretary invalid, so here the Order of Division 5 was and is likewise fatally defective and invalid.

The lower Court erred in its finding that the appellant has not been injured by the interpretation of the Commission for the reason he may continue operation under his Swift and Libby contracts and may add other contracts for the transportation of similar property for food canners and meat packers in the territorial area covered by him in the crucial date (R. 343).

As packing houses and food canneries are comparatively scarce in appellant's territorial area, and are usually large corporations who use only a very limited contract carrier service, the appellant, under the Interstate Commerce Order, is really at the mercy of these big corporations. Swift and Company are practically the only packing house that uses contract carrier service to any extent between the Twin Cities area and Chicago, and by limiting appellant's operation in that respect to service for packing houses, it practically deprives him of his statutory right to substitute or add contracts within the scope of his permit. With meat rationing in effect, appellant's business has already dropped approximately 50% and the Commission's restrictions will ultimately put him out of business. If Swift & Com-

pany should decide to establish its own Sales Organization —a separate entity or a separate distributing company—appellant would have no authority whatsoever to transport products for them. The same would apply to food canneries.

It is readily apparent therefore that the restrictions, as to commodities, territory and shippers, imposed upon appellant by the Commission will cause him irreparable injury, will pulverize his bona fide "grandfather" operation and will practically destroy it; and that the denial to appellant of a fair hearing in the matter is in violation of the Fifth Amendment to the Constitution of the United States which provides that "no person shall * * * be deprived of * * * property without due process of law."

Moreover, such restrictions of a carrier in his "grandfather" operation, and a denial of a fair hearing thereon contravene the declared policy of the Motor Carrier Act, and practically abrogate the rights of those carriers, such as appellant, who have at large expense and through initiative, enterprise and hard work, attained a position in the competitive transportation system, and which position Congress sought earnestly to preserve through the "grandfather" clause of the Act.

Surely, the Commission's interpretation of the applicable provisions invoked in appellant's case, is entirely contrary to the liberal interpretation this Court, in the *U. S. v. Carolina Freight Carriers Corp.* case, supra, has held should be given to the Act.

CONCLUSION.

The Order and Decree of the lower Court should be reversed and the Order of the Interstate Commerce Commission annulled and set aside, and the Commission directed to amend and liberalize its findings and to issue to appellant authority and a permit in conformity to the evidence and proper interpretation of the law in this case.

Respectfully submitted,

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Dated this Fourth Day of March, 1943.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 511.

JOHN F. NOBLE, Doing Business as NOBLE TRANSIT COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

BRIEF IN BEHALF OF THE CONTRACT CARRIER DIVISION OF THE AMERICAN TRUCKING ASSNS., INC.

On Appeal From the District Court of the United States, District of Minnesota, Third Division.

C. D. TODD, JR.,
Attorney for Intervenor.

Washington, D. C.
March 26, 1943.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

FOREWORD 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

QUESTIONS PRESENTED 3

SUMMARY OF ARGUMENT 4

I. Argument 7
Questions Presented are of a Legal Nature and do not Require the Weighing of the Evidence by the Court 7

1. The Commission's Power to Issue Permits Governed by Statute 7

2. Proper for the Court to Disturb Order of the Commission When It Misconstrues the Law ... 8

II. The Findings, Conclusions and Order of the Court Erroneously and Unlawfully Restrict the Liberal Provisions of the "Grandfather" Clause and Related Provisions of the Act, by Applying to and Embodying in that Clause the More Restrictive Provision as to Procedure in Section 209 (b) of the Act in Determining the "Grandfather" Rights Set Forth in Section 209 (a) of the Act, and Failed to Interpret the Meaning of the Liberal Language Employed by Congress in Defining, Designating and Determining "Grandfather" Rights as Distinguished from the Rights of Carriers who Seek New or Extension Operations. (Assignment of Error 6, R. 353) 9

1. Terms of "Grandfather" Clause Given Permit to Which Appellant Is Entitled 10

2. Commission Applied a Standard For Determining Rights Which Is Not Found in the Law 14

Page

III. The Decision and Order of the Court Erroneously and Unlawfully Recognize a Power in the Interstate Commerce Commission to Define the Business of the Carrier and the Scope Thereof by Designating the Business, or Merely Some Part Thereof, of the Shippers for Whom the Petitioner May Transport Commodities, Whereas the "Grandfather" Clause of the Motor Carrier Act of 1935 and its Amendment and Related Provisions Limit the Power of the Commission to Define the Business of the Carrier, Under a "Grandfather" Operation, by the Commodities he Carried and the Territory he Served. (Assignment of Error 4, R. 352) 17

1. The Statute Does Not Require Imposition of the Restriction 17

2. Imposition of Restriction Contrary to Congressional Intent 21

IV. The Findings, Conclusions and Order of the Court Unlawfully Restrict the Right of the Plaintiff to Substitute or Add Contracts Other Than With Packing Houses and Food Canneries, Contrary to the Proviso of Section 209 (b) of the Motor Carrier Act. (Assignment of Error 8, R. 353.) 25

1. The Order As Presently Written Would Prohibit Service to Shippers Other Than Packing Houses and Food Canneries 25

2. If the Opinion of the Lower Court is Followed, the Proviso Found in Section 209 (b) Will Be Rendered Meaningless 26

V. CONCLUSION 27

APPENDIX 30

(A) PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE 30

(B) GENERAL DUTIES AND POWERS OF THE COMMISSION 32

TABLE OF CASES CITED.

	Page
Baltimore and Ohio Railroad Company v. United States, 277 U. S. 291, 299-300	8
C. and D. Oil Company Contract Carrier Application, 1 M. C. C. 329, 332	14
Cong. Rec. 5654 and 5664	22, 23
Duplex Printing Press Company v. Deering, et al., 254 U. S. 443	21
Keystone Transportation Company Contract Carrier Application, 19 M. C. C. 475	14, 28
19 M. C. C. 491	15
19 M. C. C. 494	15
19 M. C. C. 502	15
A. Magnano Company v. Hamilton, Atty. Gen., et al., 292 U. S. 40	18
Motor Carrier Act of 1935	2, 17, 21, 23, 25
Part II, Interstate Commerce Act	2, 3, 4, 6, 7, 8, 9, 16, 20, 21, 23, 27, 30, 31, 32
Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433	8
U. S. of America and Interstate Commerce Commission v. Carolina Freight Carriers Corporation, 315 U. S. 475	8, 16, 17, 21, 28, 29
315 U. S. 489	17
315 U. S. 481	29
United States v. Missouri P. R. Co., 278 U. S. 269	8
United States v. Pennsylvania Railroad Company, 242 U. S. 208, 229	8
Webster's New International Dictionary	18

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BRIEF IN BEHALF OF THE CONTRACT CARRIER DIVISION OF THE AMERICAN TRUCKING ASSNS., INC.

On Appeal From the District Court of the United States, District of Minnesota, Third Division.

FOREWORD.

The undersigned attorney presents this brief as amici curiae in behalf of the Contract Carrier Division of the American Trucking Associations, which is a non-profit trade association, the members of which are all contract motor carriers. Many of the member carriers are subject to the jurisdiction of the Interstate Commerce Commission and therefore, have a vital interest in the questions of statutory construction and application involved in this case, even

though they have no interest in the extent of the authority to which appellant may be entitled. This brief, therefore, will confine itself to a discussion of the questions presented in so far as they concern the construction and application of the provisions of the statute involved.

STATUTE INVOLVED.

The relevant provisions of Part II of the Interstate Commerce Act, on the date of the Commission's order of May 13, 1941, are set forth in the Appendix, infra, pp. 30 to 32.

STATEMENT OF THE CASE.

The Contract Carrier Division being interested only in the construction placed upon the provisions of law involved will offer, but a brief statement of the facts. A more detailed factual statement is set forth in appellant's brief.

Appellant in September, 1934, began a motor transportation business. (R. 333) After the Motor Carrier Act, 1935, was enacted and became law, appellant made timely application for a contract carrier permit. (R. 334) The Interstate Commerce Commission, By Division 5, Commissioners Lee, Rogers and Patterson on May 13, 1941, decided the application making the following findings: (R. 14-23)

> *Findings:* We find that on July 1, 1935, and continously since, applicant has ben in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce *under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses,* (a) of cannen foods from Blue Island, Illinois, to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minnesota, and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul, to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and Points in that portions of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wiscon-

sin, and U. S. Highway 53 from La Crosse to Cameron, Wisconsin, and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minnesota, and La Crosse, Wisconsin; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied. (R. 23) (Italics added)

Appellant filed a petition for reconsideration with the Interstate Commerce Commission which was denied on August 26, 1941. (R. 25) After the denial of the petition for reconsideration, appellant filed a complaint in the District Court of the United States, District of Minnesota, Third Division. (R. 1) Hearing was held on such complaint and the Court on July 24, 1942, filed its opinion, and findings of fact and conclusions of law, upholding the decision and order of the Interstate Commerce Commission. (R. 332-350)

On August 10, 1942, appellant filed with the lower Court, a Petition for Appeal and Assignments of Error, on the same date the Court allowed the appeal. (R. 350-351) On August 12, 1942, appellant filed with the Court below, a Petition for Order Staying Final Decree Pending Appeal, on the same day the District Court stayed the final decree. (R. 354-357) On August 14, 1942, appellant filed with the lower Court a Notice to the Attorney General of the State of Minnesota. (R. 357) On November 4, 1942, appellant filed with the Supreme Court a Request to Prepare and Print Record and Statement of Points To Be Relied Upon On Appeal. (R. 358)

QUESTIONS PRESENTED.

The instant case brings before this Court a novel question of law. The validity of the Interstate Commerce Commission's Order depends upon whether it and the Court below have properly interpreted Section 209, Part II of the

Interstate Commerce Act. The questions raised by appellant in which the Contract Division, American Trucking Associations, Inc., is interested are:

1. Does Section 209, Part II of the Interstate Commerce Act authorize the Commission to specify "the business of the carrier and the scope thereof" in the permits of carriers, like appellant, who have been in business prior to and continuously since July 1, 1935? (Assignment of Error 6, R. 353)

2. If the law does so authorize the Commission, does this authorization empower the Commission to describe that business in terms of the business engaged in by the carrier's shippers? (Assignment of Error 4, R. 352)

3. Does the authority to specify the business of the Carrier and the scope thereof empower the Commission to limit and restrict, appellant, and those similiarly situated to serving a certain class or classes of shippers? (Assignment of Error 8, R. 353)

4. Does the authority to specify the business of the carrier and the scope thereof authorize the Commission to limit appellant's permit for the purpose of eliminating competition? (Assignment of Error 6, R. 352)

SUMMARY OF ARGUMENT.

The argument herein presented concerns itself exclusively with a question of statutory construction, which in turn defines the limits of the Commission's authority. It is our contention that the lower Court erred in affirming the interpretation of the statute adopted by the Commission, and that such interpretation has resulted in an exercise of a power by the Commission which was not granted by Congress. Orders of the Interstate Commerce Commission which depend upon an interpretation of the law for their validity may be enjoined by this Court.

Section 209 of Part II of the Interstate Commerce Act governs the issuance of permits to contract motor carriers. The validity of the Commission's order in the in-

stant case depends upon the interpretation of the language of this section.

The lower Court affirmed the order of the Commission which limited appellant to serving persons engaged in business as packing houses and food canneries. This limitation was imposed on the theory that it specifies appellant's business and the scope of such business.

The language in the section under consideration which empowers the Commission to specify the business of the carrier and the scope thereof appears in paragraph (b) of section 209.

Appellant has been in business as a contract carrier by motor vehicle since prior to July 1, 1935. The application filed by him which led to the instant case was for the authority to which he is entitled as one who has been in business prior to and continuously since July 1, 1935. Section 209 bestows upon those in business prior to and continuously since July 1, 1935, certain rights. These rights and the standards for determining the same are found in the first proviso of paragraph (a).

As previously stated, the power to specify the business of the carrier and the scope thereof is found in paragraph (b) which governs only those who seek to enter the business of transporting property by motor vehicle subsequent to July 1, 1935. Nowhere in the so-called "grandfather" clause is the Commission given authority to specify in the permit the business of the carrier and the scope thereof, and nowhere is this language, either expressly or by implication, incorporated into the clause. The lower Court, therefore, erred in affirming the Commission's order wherein such authority was exercised.

In specifying the business of the appellant and the scope thereof the Commission applied a standard not provided for by the law. The specification which was adopted was used for the purpose of preventing appellant from competing with common carriers for business. Nothing in the "grandfather" clause of section 209 provides that the

Commission is to consider the question of competition when determining the rights to which a "grandfather" operator is entitled.

While we contend that the Commission has no authority to specify the business of the carrier and the scope thereof in the permits of "grandfather" operators, even assuming that such power does exist, it does not authorize the Commission to restrict appellant as was here done.

This Court has said that Part II of the Interstate Commerce Act is to be given a liberal construction and that no restrictions are to be imposed upon carriers which are not required by the clear requirements of the statute. In order for the Commission to specify in appellant's permit his business and the scope thereof, it is not necessary to restrict him to transporting property for a particular class or classes of shippers; therefore, the Commission in so doing restricted his "prior opportunity" beyond the "clear requirements of the statute."

A real doubt exists as to what Congress intended for the Commission to put into the permit as a specification of the business and the scope thereof; therefore, it is necessary and proper to determine the true Congressional intent. A change made in this phrase and statements made by Senator Wheeler, Chairman of the committee in charge of the legislation, both indicate that Congress did not intend for a limitation of this nature to be imposed.

Congress by the proviso found in paragraph (b) tried to protect contract carriers from the exercise of a power by the Commission which would limit their right to contract and to add or substitute vehicles. Adoption of the lower Court's interpretation of the statute will completely destroy the effect of this proviso and make it possible for the Commission to restrict appellant and others similarly situated to serving certain specified shippers and will make it possible for the Commission to limit the number of vehicles which appellant may operate.

ARGUMENT.

I.

Questions Presented Are of a Legal Nature and Do Not Require the Weighing of the Evidence by the Court.

We recognize that administrative agencies must be accorded rather broad latitude in carrying out the duties imposed upon them by Congress. However, those whose business and property are subject to the regulations of administrative tribunals are entitled to protection against the acts of such bodies which are beyond the powers delegated by Congress. Therefore, if an administrative agency issues an order based upon a misconstruction of the law it is proper for the judiciary to issue an injunction. The duty of the judiciary to issue an injunction under such circumstances is a vital and important part of the administrative processes, for otherwise the fortunes of those subject to regulation would be completely at the mercy of the regulatory authority.

1. The Commission's power to issue permits governed by statute.

Section 209, Part II of the Interstate Commerce Act, governs the granting of permits to contract motor carriers. Paragraph (a) of the section controls the granting of permits to contract carriers who were in business on July 1, 1935. According to this paragraph the Commission is to issue a permit if timely application is made and if the applicant was in bona fide operation prior to and continuously since July 1, 1935, over the route or routes or within the territory for which application was made. If these conditions are not present the application for authority is to be decided in accordance with paragraph (b) of the same section. In deciding applications under paragraph (a) the Commission is not to consider competitive factors or the fitness and ability of the applicant, but is

only called upon to determine whether the applicant was in business on the crucial date and has remained in business and whether application was made within the time prescribed by the Commission.

2. Proper for the court to disturb order of the Commission when it misconstrues the law.

This Court has in many instances set aside orders of the Interstate Commerce Commission when it has determined that the Commission has misinterpreted the statute. Without reviewing all the cases we would like to call the Court's attention to a few of such cases.

(a) The order of the Commission was set aside in *United States* v. *Pennsylvania Railroad Company*, 242 U. S. 208, 229, and *Baltimore and Ohio Railroad Company* v. *United States*, 277 U. S. 291, 299-300, because the Commission predicated its order on a misconstruction of the word "practice."

(b) In *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, the order of the Commission was set aside because it erred by attributing too narrow a meaning to the statute. In that case the Commission found that Section (15) (4) (U. S. C. Title 49, Sec. 15 (4)) of the Interstate Commerce Act only applied in favor of the carrier owning the property.

(c) In *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, the order of the Commission was set aside because it was predicated upon economic considerations rather than upon transportation ones.

(d) In *Carolina Freight Carriers Corp.* v. *United States et al.*, 315 U. S. 475, the order of the Interstate Commerce Commission was set aside because it applied different standards to the appellee as an irregular route carrier than was applied to regular route carriers even though both classes of carriers were entitled to the same treatment under the law.

II.

The Findings, Conclusions and Order of the Court Erroneously and Unlawfully Restrict the Liberal Provisions of the "Grandfather" Clause and Related Provisions of the Act, by Applying to and Embodying in that Clause the More Restrictive Provision as to Procedure in Section 209 (b) of the Act in Determining the "Grandfather" Rights Set Forth in Section 209 (a) of the Act, and Failed to Interpret the Meaning of the Liberal Language Employed by Congress in Defining, Designating and Determining "Grandfather" Rights as Distinguished from the Rights of Carriers Who Seek New or Extension Operations. (Assignment of Error 6, R. 353).

The lower Court in its opinion stated:

> "The Act itself defines the powers and duties of the Commission pertaining to the questions with which we are concerned. We thus approach a consideration of the statutory authority of the Commission under the Act. Section 209 (a) of the Act denies the right of a contract carrier to engage in business in interstate commerce within the jurisdiction of the United States without a permit by the Commission, and it specifies the conditions that entitle a carrier to a permit.
>
> "Section 209 (b) outlines the procedure for acquiring the permit and what the permit shall contain. It requires the carrier to show that he is able to render the service of a contract carrier, that he is willing to conform to the law and the lawful requirements of the Commission, and that the proposed operation will be consistent with the public interest and the declared policy of Congress; it further provides that 'the Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof.'"

Section 209, Part II of the Interstate Commerce Act is set forth in full in the Appendix, *infra*, pp. 30 to 32. This sec-

tion of the law governs the issuance of permits to contract motor carriers. From the above statement of the Court it is clear that it interpreted the section as not making any distinction between contract carriers who were in business on July 1, 1935, commonly referred to as "grandfather" operators, and those who desire to enter the business subsequent to that date, commonly referred to as "new" operators. Section 209 (b) provides in part that:

> "The Commission shall specify in the permit the business of the Contract Carrier covered thereby and the scope thereof . . . "

The lower Court found that this authority of the Commission to make specifications in the permits of contract carriers applied to those in operation on July 1, 1935. It was only possible for the Court to make such a finding by interpreting the statute as not making any distinction between "grandfather" operators and "new" operators.

1. Terms of "Grandfather" clause govern permit to which appellant is entitled.

If the lower Court's interpretation of this section were followed, every contract carrier in the United States, transporting property in interstate or foreign commerce, would have been in violation of the law when the same became effective. Likewise, all so-called "grandfather" operators, in order to obtain a permit, would have had to prove that they were fit, willing and able to perform the service and that their operations were consistent with the public interest and the National Transportation Policy.

It is true that the first paragraph of the section makes it unlawful for any person to transport property in interstate or foreign commerce as a contract motor carrier without first obtaining from the Interstate Commerce Commission a permit to do so; however, the first proviso, commonly referred to as the "grandfather" clause in the Act, makes it lawful for those carriers in business on July 1, 1935, to continue until such time as the Commission shall

act upon their applications for a permit, provided that the applications for such permits were filed one hundred and twenty days after the law became effective.

The second paragraph of the section does provide in substance that the Commission shall issue a permit on a finding that the applicant is fit, willing and able to perform the service, and that the proposed service is consistent with the public interest and the National Transportation Policy; however, the "grandfather" clause provides that those contract carriers in business on July 1, 1935, need not prove that they are fit, willing and able to continue the service nor need they prove that continuance of the service is consistent with the public interest and the National Transportation Policy.

Since the Court below found that the provisions of paragraph (b) were applicable to appellant as a "grandfather" operator, it was perfectly proper to find that the Commission could specify in his permit the business and the scope thereof. The Court below erred, however, in finding that the provisions of paragraph (b) are applicable to the instant application.

To properly interpret this section due consideration must be given to the form in which it is written, as well as to the language used. The section is divided into two paragraphs, each of which contains subdivisions in the way of provisos. Paragraph (a) contains two provisos and paragraph (b) one. The paragraphs and provisos each deal with a particular subject. That part of paragraph (a), not included in either of the provisos, applies to all persons and makes it unlawful to engage in business as a contract motor carrier without a permit from the Commission. The first proviso contains an exception to this general rule and applies only to those persons who were in business on July 1, 1935, as contract motor carriers in interstate or foreign commerce and who applied for a permit within the time prescribed. This proviso also bestows on the carriers who come within its provisions certain rights and sets up stan-

dards for determining those rights. The second proviso retains in the Secretary of Interior certain jurisdiction over motor vehicles operated within national parks and monuments. That language in paragraph (b) which is not found in the proviso sets forth the manner in which applications are to be filed, the conditions under which permits are to be granted persons who were not in business on July 1, 1935, the specifications which are to be placed in such permits and the conditions under which and purposes for which restrictions or limitations may be placed in such permits by the Commission. The proviso in paragraph (b) sets forth definite limitations on the power of the Commission to restrict the permits of contract carriers.

It is readily discernible that permits are to be issued to carriers in appellant's position in accordance with the term of the so-called "grandfather" clause. That clause does not authorize the Commission to specify in the permits of such carriers "the business of the carrier and the scope thereof." The authority to so specify in the permit is found in paragraph (b) which covers the issuance of permits to the so-called "new" operators. In order to find that the Commission may so specify in the permit of the appellant and those similarly situated, it must be found that this particular portion of paragraph (b) is incorporated into the proviso either expressly or by implication.

There is nothing in the "grandfather" clause or in paragraph (b) which expressly states that the authority to specify "the business of the carrier and the scope thereof" is incorporated into the "grandfather" clause. Therefore, Congress did not expressly incorporate this language into the proviso under consideration. Is there anything in the language used by Congress which indicates that the language is incorporated into the clause by implication?

That part of the proviso dealing with the type of permit to be issued reads as follows:

> ". . . subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as

> a contract carrier by motor vehicle on July 1, 1935, over the route or routes, or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue *such permit*, . . . " (Italics added).

What type of permit was meant by Congress when it used the phrase "such permit?" Was it one which had already been described, or one the nature of which was to be described in the future?

The word "such" usually refers back to something already stated, or described; for example, in the first sentence of paragraph (a) the terms "such carrier", "such person" and "such business" are used, these terms undoubtedly refer back to "contract carrier", "person engaged in business as a contract carrier" and "the business of a contract carrier" respectively. In short, the word "such" is used to refer back to something already described. It would seem, therefore, that the term "such permit" refers back to one previously described, or the one applied for to operate over the route, or routes, or within the territory which the carrier had served prior to July 1, 1935, and since.

The "grandfather" clause does provide for the type of permit to be issued to appellant and all other contract carriers who come within its provisions; therefore, to incorporate other language into the clause which would alter the type of permit to be issued would directly violate the expressed intention of Congress. For that reason it would seem improper to incorporate this language into the proviso by implication.

Another provision of the "grandfather" clause indicates that to incorporate this language by implication would violate the true intention of Congress. Congress expressly provided in the clause that permits were to be applied for "as provided in paragraph (b)." By so providing Congress expressly incorporated into the "grandfather" clause part of paragraph (b). It would seem,

therefore, that had it intended to incorporate the language under consideration into the clause, it would have done so expressly. Since it did not, to so incorporate by implication would be a direct violation of the Congressional intent.

2. Commission applied a standard for determining rights which is not found in the law.

As previously stated, it would seem that the lower Court's interpretation of section 209 would make it necessary for appellant and all other "grandfather" operators to prove consistency with the public interest and the National Transportation Policy in order to obtain a permit to continue in business. The Commission has never made such a finding, but the application of the restriction imposed upon appellant amounts to practically the same thing. In applications for new authority the Commission in determining the issue of consistency with the public interest and the National Transportation Policy under most circumstances gives primary consideration to competitive conditions within the territory. In a leading case on this subject the Commission said:

> " . . . We think that, in order to foster sound economic conditions in the motor carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them, as against any person now seeking to enter the field of motor transportation in circumstances such as are here disclosed."[1]

In *Keystone Transportation Company Contract Carrier Application*, 19 M. C. C. 475, the restriction here under consideration was first applied. The controlling reason for imposing the restriction was an effort on the part of the Commission to control competition between contract and com-

[1] *C. and D. Oil Company Contract Carrier Application*, 1 M. C. C. 329, 332.

mon carriers, as evidenced by the following statements taken from the Commission's decision:

> "The argument herein presents a vivid picture of the struggle for competitive advantage, and possibly in some instances, even survival between motor contract carriers and common carrier."[2]

> "... In the ordinary case the permit granted authorizes the carrier to transport a particular commodity or a class of commodities from and to certain points or within a defined territory, and by its inherent nature it provides an effective bar against any undue expansion of operation or unwarranted invasion of the business of motor common carriers. On the other hand, many applications, practically speaking, are for authority to haul general commodities over irregular routes within a defined territory. If not restricted to rendering a particular type of service, a carrier, if granted the permit sought, would be able to haul general commodities between points in its territory for any shipper under contract and perform a service which is beyond its real function. Consequently, as to such carriers there is a definite need for such restrictions in the permit granted as specifically will prevent them from rendering a type of service different from that for which authority is granted, a service that easily might seriously injure the motor common carriers in the territory of operation in a manner inconsistent with the declared policy and intent of the Act and the public interest."[3]

Commissioner Lee in his dissenting opinion in the *Keystone Case*, supra, summed up the reason for imposing the restriction in a vivid manner. He said:

> "It is sought to justify this new doctrine largely on the ground that it is necessary to protect common carriers. However, the price of such protection would be too high even if common carriers required it."[4]

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[2] 19 M. C. C. 491.
[3] 19 M. C. C. 494.
[4] 19 M. C. C. 502.

From the above statements taken from the Commission's decision it is apparent that the restriction imposed is an effort to control competition between common and contract carriers, nothing in the "grandfather" clause or nothing in section 209 or any other section of Part II of the Interstate Commerce Act gives the Commission authority to control competition between common and contract carriers in issuing permits to "grandfather" operators. The "grandfather" clause sets forth certain standards which the Commission is to follow in determining "grandfather" rights. These standards have nothing to do with competitive conditions; therefore, the Commission in deciding the instant application applied a standard to appellant's business which was not provided by Congress. In *U. S. of America and Interstate Commerce Commission* v. the *Carolina Freight Carriers Corporation*, 315 U. S. 475, the order of the lower Court, setting aside the order of the Interstate Commerce Commission, was affirmed because in the opinion of the Supreme Court the Commission had not applied the proper standards in determining the carrier's "grandfather" rights. Since the Interstate Commerce Commission in the instant case applied an improper standard, the lower Court erred in affirming the decision of the Commission.

III.

The Decision and Order of the Court Erroneously and Unlawfully Recognize a Power in the Interstate Commerce Commission to Define the Business of the Carrier and the Scope Thereof by Designating the Business, or Merely Some Part Thereof, of the Shippers for Whom the Petitioner May Transport Commodities, Whereas the "Grandfather" Clause of the Motor Carrier Act of 1935 and Its Amendment and Related Provisions Limit the Power of the Commission to Define the Business of the Carrier, Under a "Grandfather" Operation, by the Commodities He Carried and the Territory He Served. (Assignment of Error 4, R. 352.)

1. The statute does not require imposition of the restriction.

In the *Carolina Case*, supra, the Commission limited the applicant, a common motor carrier, to the transportation of certain commodities from specified points on southbound trips. This Court found such action unauthorized by the Act, stating in part:

> "... Its (the carrier's) prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system."[5]

It is true that in the *Carolina Case* this Court had before it the application of a common motor carrier, but in making the above statement the Court was speaking of the Act in its entirety and the manner in which the entire Act should be construed; therefore, it follows that in construing those provisions of the law which govern contract motor carriers, the Act should be construed liberally and appellant and other contract carriers should not be restricted "beyond the clear requirements of the statute." The Commission by

[5] 315 U. S. 489.

specifying the "business of the carrier and the scope thereof", in terms of the business of the shippers served, failed to liberally construe the Act; likewise, by using this authority to specify as a means of restricting appellant's rights, it has imposed upon appellant a restriction which is far "beyond the clear requirements of the statute." The Court below erred by affirming the Commission's action.

The lower Court in affirming the Commission's order stated:

> "Authority is expressly vested in the Commission, as we have observed to '*specify in the permit the business of the contract carier covered thereby and the scope thereof*'." (Italics added) (R. 340).

Assuming that the Commission may so specify in the permit of appellant and those similarly situated, does this authority, if liberally construed and if applied so as not to restrict appellant "beyond the clear requirements of the statute", empower the Commission to limit appellant and others so situated to serving a particular class or classes of shippers? To answer this question we must determine what the authority to "specify" authorizes, and determine the meaning of the words "business" and "scope". After making these determinations, we must ascertain exactly what the Commission has done and then finally determine whether what has been done is a liberal application of the law and whether the restriction imposed is a clear requirement of the statute.

There is nothing in the law which indicates that the words "specify", "business" and "scope" are to be given an unusual meaning. For that reason, in construing the statute these words should be given their common or ordinary meanings.[6] An accepted authority for the common meaning of words is Webster's New International Dictionary, Second Edition, Unabridged. According to this authority the verb

[6] *A. Magnano Company* v. *Hamilton, Atty. Gen., et al.*, 292 U. S. 40.

"specify" means to name or describe. The noun "business" is defined as: "Any particular occupation or employment habitually engaged in, especially for livelihood or gain." The noun "scope" has several definitions. Those which have application to the particular question at hand are:

"(1) Room or opportunity for free outlook, aim, or action; amplitude of opportunity; free course or vent; liberty.

(2) Space for freedom of movement; room; range.

(3) Length; extent; sweep."

The Commission found, and the lower Court upheld the finding, that applicant was entitled to a permit authorizing the transportation as a contract carrier by motor vehicle of:

"(a) Canned foods from Blue Island, Illinois, to St. Paul, South St. Paul, Minneapolis and Minnesota Transfer, Minnesota;

(b) Fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul, to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and points in that portion of Wisconsin in and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wisconsin, and on and south of U. S. Highway 8;

(c) The commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minnesota, and La Crosse, Wisconsin, over irregular routes; for "persons (as defined in section 203 (a) (1) of the Act) who operate food canneries or meat packing businesses."

What part of the above language names or describes the occupation in which appellant is engaged for compensation and what part of the order describes where he might engage

in such business with liberty and freedom of movement." Such portions of the order we respectfully allege are the only ones which can properly be said to specify the "business of the carrier and the scope thereof".

That part of the order which describes appellant's business as a contract carrier by motor vehicle does name the business in which he is engaged for compensation. That part of the order which states that appellant is a carrier of property is also a description of his business. That portion of the order which states further that the service is performed over irregular routes is also a description of the business. That part of the order which specifies the commodities which may be transported is also a description of appellant's business. That part of the order which sets forth the geographical limitations of appellant's authority specifies the scope of the business. That part of the order which restricts the service to "persons, . . . who operate food canneries or meat packing businesses," does not name or describe appellant's business or the scope of that business, but places a limitation or restriction on both the business and the scope.

If the Commission had specified the business of appellant and the scope thereof by saying that he is a contract carrier of property over irregular routes of certain commodities within a described area, it would have clearly satisfied the requirements of the statute, for there is nothing in Part II of the Interstate Commerce Act which clearly requires the imposition of the restriction here imposed. Since this Court found that restricting a common carrier to transporting certain commodities between specified points under certain conditions was not clearly required by a liberal interpretation of the statute, it would seem that it should likewise find that a restriction, limiting appellant and others similarly situated to a certain class of shippers, is not clearly required by a liberal interpretation of the statute.

2. Imposition of restriction contrary to congressional intent.

It is clear that there is some confusion concerning what Congress intended when it authorized the Commission to specify in the permits of contract carriers the "business of the carrier and the scope thereof." For that reason, it is proper to consider statements made by the Chairman of the Congressional Committee handling the legislation and the history of the law in order to determine the true Congressional intent.

Part II of the Interstate Commerce Act clearly authorizes the Commission to impose geographical restrictions on both certificates of common motor carriers and the permits of contract motor carriers. In the *Caroline Case*, supra, this Court found it proper under certain circumstances, and if proper standards were applied, to impose commodity restrictions on the certificates of common carriers; therefore, if the Commission in specifying the "business of a contract carrier and the scope thereof" set forth the geographical limitations within which the carrier could operate and specified the class or classes of commodities which it could transport, it would be according to contract motor carriers the same treatment which is accorded to common motor carriers, and this is exactly what Congress intended for the Commission to do.

Senator Wheeler, Chairman of the Committee on Interstate and Foreign Commerce, which handled the Motor Carrier Act of 1935, made a statement in connection with section 209 which demonstrates clearly that Congress intended for contract and common carriers to be treated alike in the granting of "grandfather" applications. In explaining the bill Senator Wheeler said:

> "Permits are to be issued to contract carriers under substantially the same conditions as certificates are issued to common carriers, except that the granting of a

[7] *Duplex Printing Press Company* v. *Deering, et al.*, 254 U. S. 443.

permit, not covered by the 'grandfather' clause, is not made conditional on a showing of public convenience and necessity. In other words, contract carriers in their applications do not have to make a showing of public convenience and necessity.

"Applicants are required to show, among other things, however, that the *proposed* operation to the extent authorized by the permit, will be consistent with the public interest and policy declared in section 202 (a)."[8] (Italics added.)

The above statement made by Senator Wheeler proves conclusively that contract carriers, coming within the provisions of the "grandfather" clause, were to be granted permits upon the same basis as common cariers, coming within the "grandfather" clause, are granted certificates, and that the carriers starting business subsequent to July 1, 1935, were to be granted a permit only upon showing that the proposed operation will be consistent with the public interest and the policy declared in section 202 (a).

The naming of the class or classes of commodities which may be transported and the territory within which they may be transported is a specification of a carrier's business and the scope thereof, while the limiting of the transportation to services performed for a certain class or classes of shippers is a specification of the *operations* and the scope thereof. Most contract carrier businesses are made up of several operations. That is why in the industry a motor carrier business is often referred to as *operations*, but never as *operation*, singularly. In distinguishing one operation in a given business from another the class of shipper for whom it is performed is sometimes used as a distinguishing feature; however, even in describing particular operations other methods of distinguishing are very often employed. Therefore, if Congress had intended for the Commission to specify each individual operation and the scope thereof, there would have been some reason to believe that Congress

[8] 79 Cong. Rec. 5654.

intended for the Commission to distinguish between operations by naming the class or classes of shippers served. The history of this statute shows clearly that Congress did not intend for the Commission to specify in the permits of contract carriers the *operations* and the scope thereof.

When the bill which later became the Motor Carrier Act of 1935 was placed before the Senate Committee on Interstate and Foreign Commerce by Commissioner Eastman, who was then Federal Coordinator of Transportation, section 209 (b) provided that:

> "The Commission shall specify in the permit the operations covered thereby and the scope thereof . . ."[9]

The Senate Committee eliminated the word "operations" and substituted the words "business of the contract carrier." This change made by the Senate Committee shows clearly that Congress did not intend for the Commission to specify in the permits of contract carriers the individual operations conducted on the "grandfather" date, but rather intended for the Commission to specify in the permit a broad statement of the business in which the carrier was engaged and the scope of that business.

If any doubt exists that this was the true intent of Congress in making the change, the following statement made by Senator Wheeler on the floor of the Senate in explanation of this change certainly clarifies that doubt:

> ". . . This section (referring to section 209) has been changed in lines 19-22, page 27, to make clear that the bill applies to the business of contract carriers and not merely operations under the individual contracts."[10]

Congress did in Part II of the Interstate Commerce Act delegate to the Commission a power to restrict and limit the permits of contract carriers. This delegation of authority is found in section 209 (b) and reads as follows:

[9] 79 Cong. Rec. 5664.
[10] 79 Cong. Rec. 5654.

> "The Commission . . . shall attach to the permit at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6))."

The power to restrict here delegated is a very limited one for it may only be used when necessary to cary out the requirements established under section 204 (a) (2) and (6). No effort was made by the Commission or by the Court below to justify the restriction imposed in the instant case as coming within the power set forth above. This restriction was saddled upon appellant for but one reason and that was to prevent him from competing with common carriers.

Does the fact that Congress delegated a limited authority to the Commission to impose restrictions and limitations in the permits of contract carriers show an intent to delegate a broader authority? The answer to this question is obviously "no" for had Congress intended for the Commission to exercise a broad discretionary power in limiting and restricting the permits of contract carriers, it would not have restricted and limited the power which it did delegate. As a matter of fact, the granting of the limited power definitely negatives an intent to grant a broader power. Therefore, the Commission, by exercising a broader power and the lower Court by approving the exercise of such power, definitely ignored the true intent of Congress.

The decision and order of the Court erroneously and unlawfully recognizes a power in the Commission to define the "business of the carrier and the scope thereof" by designating the business or merely some part thereof of the shipper whom appellant serves because a proper and liberal construction of the law does not require the imposition of such a restriction and because the imposition of the restriction is clearly contrary to the true Congressional intent.

IV.

The Findings, Conclusions and Order of the Court Unlawfully Restrict the Right of the Plaintiff to Substitute or Add Contracts Other Than With Packing Houses and Food Canneries, Contrary to the Proviso of Section 209 (b) of the Motor Carrier Act. (Assignment of Error 8, R. 353).

1. The order as presently written would prohibit service to shippers other than packing houses and food canneries.

Section 209 (b) provides in part as follows:

> "Provided, however, that no terms, conditions or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment or facilities within the scope of the permit as the development of the business and the demands of the public may require."

As we have seen, the Court below erred in affirming the Commission's order, restricting appellant to serving food packers and food canners on the theory that such a restriction was a specification of appellant's business and scope thereof. The specification of appellant's business and the scope thereof should only include the naming of the class or classes of commodities which may be transported and the territory within which they may be transported. Will a restriction, limiting appellant to serving food packers and food canners, violate the proviso set forth above if the permit contains a proper specification of the business and scope thereof.

Fresh meats, packing house products, canned foods and supplies are not shipped exclusively by packing houses and canneries. They are shipped extensively by wholesale grocers, chain grocers and food jobbers. If the restriction here imposed remains in the permit, appellant may not perform services for wholesale grocers, chain grocers or food

jobbers. For that reason, he may not substitute or add contracts with such persons; therefore, the imposition of the restriction would clearly restrict his valuable right to substitute or add contracts within a proper description of the scope of his business.

2. If the opinion of the lower court is followed, the proviso found in section 209 (b) will be rendered meaningless.

In its opinion the lower Court said:

> ". . . The business of the shipper may be described in the permit if it thus can be made more accurately to define the limitations of the business of the carrier . . . Authority was vested in the Commission to determine the character and extent of the service on the crucial date and to issue a permit in accordance therewith; and the power to specify the scope of the business meant the authority to define the extent of the operations that might be conducted under it. This means that the Commission could select the language and the method of specifying the scope of the business . . ."

The language above indicates that in the lower Court's opinion the Commission could use any language it saw fit to specify the business of appellant and the scope of that business so long as the language used accurately defined the "limitations of the business of the carrier." If this be true, the proviso quoted above is completely meaningless.

Under such an interpretation the Commission could specify appellant's business and the scope thereof as transporting property for those shipper's served on July 1, 1935. In the instant case, the Commission could describe the business and scope thereof as transporting property for Swift and Company and Libby, McNeil and Libby. If the permit contained such a specification, appellant would be precluded from serving any other shippers. Therefore, that portion of the above proviso which prohibits the Commission from attaching to the permit any limitation which would interfere with the right to substitute or add contracts would be without meaning.

On July 1, 1935, appellant operated in his business three trucks. If the Commission may describe his business and scope thereof in any manner it sees fit so long as it accurately limits his business, it might describe the business as operating three trucks, serving Swift and Company and Libby, McNeil and Libby. If the permit contained such a limitation, appellant would not be able to make any additions to his fleet. As a matter of fact, the Commission could describe the business as operating three 1935 International trucks and appellant would not be able to so much as replace the old trucks with new ones. Undoubtedly, such a restriction would render meaningless the proviso above quoted, but still such action could be taken if the lower Court's interpretation of the language is correct.

Congress had no intention to limit appellant and others similarly situated to serving a particular class of shippers or to serving particular shippers or to operating a limited number of vehicles. To be certain that the right to contract would not be so restricted, Congress passed the proviso set forth above. To follow the lower Court's opinion will completely frustrate the efforts of Congress to protect the valuable right to contract.

V.

Conclusion.

In the instant case the lower Court was called upon to pass upon the interpretation which the Interstate Commerce Commission placed upon section 209 of the Interstate Commerce Act. The Commission found that this section conferred upon it the power to specify in appellant's permit his business and the scope thereof. The Court below affirmed this finding. The lower Court erred in affirming this finding of the Commission because the language delegating authority to the Commission to make such specifications in the permits of contract carriers is found in paragraph (b) of the section which governs applications for new authority while the appellant filed for rights as a "grand-

father'' operator, and the rights to which he is entitled as such an operator are governed by the ''grandfather'' clause which is the first proviso of paragraph (a) of the section.

The Commission in specifying appellant's business and the scope thereof did so in terms of the business engaged in by the shippers served. The Court below affirmed this action. The lower Court erred in affirming the Commission's decision even if it is assumed that the Commission has authority to specify the appellant's business and the scope thereof in his permit. The Court erred because the Commission's action is not a specification of appellant's business and scope thereof, but a limitation on his right to transport property as a contract motor carrier. The Court below and the Commission recognized that the purported specification is a restriction and a limitation, for both in their respective decisions refer to it as such.

Since the so-called specification is in truth a restriction, it should be considered as such in determining whether or not the Commission acted within the powers delegated by Congress. Congress did delegate to the Commission a power to restrict the permits of contract carriers, but this power was carefully defined by Congress, authorizing the Commission to impose restriction only to carry out its duties set forth in section 204 (a) (2) and (6). Neither the Commission nor the Court attempted to justify the restriction here imposed on this basis.

It is apparent from a reading of the lower Court's opinion in the instant case and the Commission's opinion in the *Keystone Case* that the restriction here imposed was adopted for the purpose of preventing appellant from competing with common carriers. Nothing in the statute authorizes the Commission to give consideration to competitive conditions when determining the rights of a ''grandfather'' operator. In the *Carolina Case, supra*, the Commission in determining the carrier's ''grandfather'' rights gave consideration to competitive conditions. This Court in that case said:

> "This does not mean the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted."[11]

The Commission by giving consideration to competitive conditions in deciding the instant case applied a standard not provided for in the Act. This Court in the *Carolina Case* affirmed an order setting aside the order of the Commission on the grounds that the Commission in deciding the rights to which the applicant was entitled applied an improper standard.

Respectfully submitted,

C. D. Todd, Jr.,
Attorney for Intervenor.

Washington, D. C.
March 26, 1943.

[11] 315 U. S. 481.

APPENDIX.

Permits for Contract Carriers by Motor Vehicle.

"SEC. 209. (a) Except as otherwise provided in this section and in Section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation

for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under Section 204 (a) (2) and (6): *Provided, however*, That

ng terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of this business and the demands of the public may require.

General Rules and Powers of the Commission.

"SEC. 204. (a) It shall be the duty of the Commission—

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and report, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration;"

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No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1942

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, APPELLANT

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

In the District Court of the United States for the District of Minnesota, Third Division

Civil Action No. 281

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's petition to set aside an order of the Interstate Commerce Commission entered May 13, 1941. The court's final decree was entered July 22, 1942, an appeal was allowed on August 10, the appeal papers were mailed on August 14, and were received by the Government on August 17, 1942.

Appellant, by application filed with the Commission under the "grandfather" clause of Section

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209 (a) of the Motor Carrier Act of 1935, sought a permit authorizing continuance of operations as a contract carrier by motor vehicle of general commodities in interstate commerce, with certain exceptions, between specific points and areas in the states of Minnesota, Wisconsin, Illinois, Iowa, and North Dakota, over regular and irregular routes.

The Commission (Division 5) found that in November 1934, appellant commenced operating as a motor carrier with two trucks under a written contract with Swift and Company, hereinafter called Swift, a meat-packing concern, from its plant at South St. Paul, Minnesota. It further found that in February 1935 appellant commenced hauling canned goods under a written contract with Libby, McNeil and Libby, hereinafter called Libby, which is engaged in the canning of foods and operates a plant at Blue Island, Illinois. It was also found that on June 1, 1935, appellant entered into a written contract with the Kraft-Phenix Cheese Corporation, hereinafter called Kraft, for the transportation of various articles, but that it performed no actual operations for Kraft until March 1936, as this arrangement required a change in Kraft's method of distribution. All traffic handled by appellant prior to the critical statutory date, July 1, 1935, and until October 15, 1935, was found to have been transported for Libby or for Swift or one of its subsidiaries. The Commission stated that appellant's principal operations under these contracts had consisted in rendering a specialized transpor-

tation service in hauling packing-house products from the Swift plant at South St: Paul for deliveries to Wisconsin points, following which the truck proceeded to Chicago or Blue Island to pick up loads at the plants of Swift or Libby, respectively, for delivery into Minnesota. The shipments from Blue Island were found to have consisted only of canned foods, but from Chicago and South St. Paul they were found to have consisted of canned goods, meats, various packing-house products, dairy products, and innumerable supplies used in conjunction with the manufacture or distribution of those products. While the Commission acknowledged that appellant had transported a wide range of commodities, it found that "the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products, and supplies in the manner hereinbefore described."

On the basis of these and other subordinate findings the Commission made the following ultimate finding:

> *Findings.*—We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul,

South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packinghouse products and supplies, from South St. Paul, to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied.

The Commission's order was thereupon issued to limit appellant's operations in accordance with the above findings.

The District Court in its opinion stated that appellant claimed to have made subsequently to the "grandfather" date approximately 120 contracts with shippers for transportation, more than 80 of which are still in existence. This brought appellant into competition with common carriers and certain common carrier trucking associations intervened as defendants before the District Court. A contract carrier association and Kraft intervened on behalf of plaintiff below.

The decree of the court below sustaining the Commission's order should be affirmed without argument because the appeal therefrom presents no substantial question. Two principal arguments were made before the lower court: (1) appellant, while admitting that the Commission might specify, in a "grandfather" contract carrier permit, the classes of property to be carried, contended that the Commission was without authority to restrict the permit to carriage for certain designated classes of shippers; and (2) the Commission's action in refusing to consider the Kraft contract service part of appellant's legitimate "grandfather" operations, and in treating such service as an unauthorized extension of operations was challenged.

(1) Section 209 (a) of the Motor Carrier Act, 49 Stat. 552, 49 U. S. C. § 309, prohibits the operation of contract motor carriers in the absence of a permit from the Interstate Commerce Commission; the "grandfather" clause provides for the issuance of permits without proof of public interest and other matters for operations carried on before July 1, 1935. Section 209 (b) states that "the Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof." * * * This requirement clearly applies to "grandfather" permits as well as to others.

The Commission in this case, applying the principles set forth in *Keystone Transportation Com-*

pany Contract Carrier Application, 19 M. C. C. 475,[1] limited the scope of the permit to the classes of shippers with which appellant had made contracts before the "grandfather" date. The question is whether the "business of the contract carrier" and "the scope thereof" may be defined in this manner, as well as by territorial and commodity restrictions. A contract carrier as distinguished from a common carrier, deals with particular shippers. As Commissioner Eastman stated in his concurring opinion in the *Keystone* case, 19 M. C. C. 499:

> * * * the phrase "the business of the contract carrier * * * and the scope thereof" means more than "just the business of being a contract carrier within a defined territory" and connotes in addition the "exact and precise character of the service to be rendered by such carrier." If * * * the "exact and precise character" of that service can sometimes be closely and accurately defined only by reference to the class of shippers that was being or is to be served, there is nothing whatever in the act which precludes us

[1] In the Keystone decision, the Commission overruled a dictum in *Longshore Contract Carrier Application*, 2 M. C. C. 480. Although one sentence of the *Longshore* opinion indicated an "unduly narrow" construction of Section 209 (b), that case held only that a permit could not be limited by name to the shipper with whom a previous contract had been made. This, of course, was correct. See Section 209 (b) (proviso).

from so defining it, and in fact it is our duty to do so.

If the business of a contract carrier could not be so defined, companies transporting many types of commodities under contract with a single chain store (as in the *Keystone* case), or for one or two manufacturing concerns dealing in many products (such as Swift & Co. in the present case), would be entitled to the equivalent of a general license allowing them to carry all such commodities for all shippers. In such circumstances, a permit not limited to the class of shippers under contract on the "grandfather" date would not accurately define the scope of an applicant's prior operations or preserve the "parity between future operations and prior *bona fide* operations which the statute contemplates." *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 22.[2]

[2] In his concurring opinion in the *Keystone* case, Commissioner Eastman declared in this connection:

"When it is considered how extensive the list of commodities is which comes 'within such commodity description,' it becomes evident that such a permit would for practical purposes be equivalent to a grant of authority to transport as a contract carrier commodities in general within the specified territory. I submit that in the case of the new operations there is no proof whatever justifying the conclusion that such a grant would be 'consistent with the public interest and the policy declared in section 202 (a).' In the case of the 'grandfather' operations, I submit that such a permit would specify and define a 'business of a contract carrier' which is far broader than the business in which applicants have actually been engaged."

(2) The claim that the Commission improperly rejected the Kraft service as part of the service within the "grandfather" rights is groundless. These operations were not actually begun until nearly eight months after the critical statutory date, even though the contract was entered into one month before. The "grandfather" clause applies only to "actual," not "potential" service on the critical date and continuously thereafter. *Mac Donald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage & Storage Co.* v. *United States*, No. 535, 1941 Term.

Appellant also argues that the territory in which operations might be conducted was unduly circumscribed, that its operations with Swift, Libby, and Kraft were merely incidental to its *bona fide* operation as a carrier of general commodities, and that Swift and Company is not merely a meat packing concern and Libby not merely a food cannery. The Commission's findings to the contrary are amply supported by the evidence, and the lower court so found. Appellant also contends that he was deprived of his constitutional right to a fair hearing in that he was not allowed oral argument, or to submit a written brief, on his petition for reconsideration of the order of Division 5. Due process does not require argument, written or oral, on an application for rehearing. Furthermore, the petitions for reconsideration themselves constituted a

written statement of appellant's position. Cf. *Morgan* v. *United States*, 298 U. S. 468, 481.

For the foregoing reasons it is evident that the errors assigned by appellant are without substance. It is respectfully submitted that the judgment of the district court should be affirmed.

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Interstate Commerce Commission.

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FILE COPY

No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1942

JOHN F. NOBLE, DOING BUSINESS AS NOBLE TRANSIT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	3
Summary of argument	13
Argument	16
I. The Commission properly limited the permit by specifying the types of business for which appellant was authorized to haul	16
A. Section 209 of the Interstate Commerce Act empowers the Commission to limit "grandfather" permits to the class of shippers served	20
B. Analysis of Section 209	24
C. To satisfy the policy of the Act, the "grandfather" permit involved must be restricted to the class of shippers served	34
II. The Commission's action with respect to the Kraft-Phenix Cheese Corporation contract is correct	41
III. The Commission rightly defined the territorial limits of appellant's operation	45
IV. Appellant received a fair hearing	46
Conclusion	46
Appendix	48

CITATIONS

Cases:	
Alton R. Co. v. *United States*, 315 U. S. 15	15, 35, 41, 45
Beekley, Contract Carrier Application, 27 M. C. C. 405	35
Benjamin Franklin Line, Common Carrier Application, 1 M. C. C. 97	42
Caravans, Inc., Contract Carrier Application, 9 M. C. C. 659	25
Clancy, Common Carrier Application, 24 M. C. C. 727	35
Contracts of Contract Carriers, 1 M. C. C. 628	19
Craig, Contract Carrier Application, 28 M. C. C. 629	19
Doudell, Contract Carrier Application, 17 M. C. C. 684	19
Filing of Contracts by Contract Carriers, 2 M. C. C. 55	19

Cases—Continued. Page

Gregg Cartage & Storage Co. v. United States, 316 U. S. 74 . . . 15, 43
H. B. Church Truck Service Co., Common Carrier Application, 27 M. C. C. 191 . . . 35
Helvering v. Reynolds Co., 306 U. S. 110 . . . 27
Howard Hall Co. v. United States, 315 U. S. 495 . . . 45
Hunter, Contract Carrier Application, 13 M. C. C. 109 . . . 25
Inter-City Transport & Motor Co., Extension of Operations, 22 M. C. C. 588 . . . 34
Jones, Extension of Operations, 21 M. C. C. 470 . . . 34
Keystone Transp. Co., Contract Carrier Application, 19 M. C. C. 475 . . . 10, 22, 26, 29, 30, 32, 34
Knight, Contract Carrier Application, 30 M. C. C. 500 . . . 27
Koelker, Contract Carrier Application, 22 M. C. C. 474 . . . 26, 34
Longshore, Contract Carrier Application, 2 M. C. C. 480 . . . 26, 30
Loving v. United States, 32 F. Supp. 464, affirmed, 310 U. S. 609 . . . 43
Marianelli, Contract Carrier Application, 22 M. C. C. 142 . . . 26
Maring Trucking Co., Inc., Contract Carrier Application, 17 M. C. C. 615 . . . 25
McCaughn v. Hershey Chocolate Co., 283 U. S. 488 . . . 26, 27
McDonald v. Thompson, 305 U. S. 263 . . . 15, 43
Morgan v. United States, 298 U. S. 468 . . . 16, 46
Motor Convoy, Inc., Contract Carrier Application, 2 M. C. C. 197 . . . 25
Noble Extension of Operations—Points in Illinois, Wisconsin, and Minnesota, 34 M. C. C. 671 . . . 15, 44, 46
Norwegian Nitrogen Co. v. United States, 288 U. S. 294 . . . 26
Puzio, Contract Carrier Application, 26 M. C. C. 555 . . . 27
Red Circle Freight Lines, Inc., Contract Carrier Application, 24 M. C. C. 319 . . . 27
Shipman Bros. Transfer Co., Contract Carrier Application, 23 M. C. C. 355 . . . 26
Sproles v. Binford, 286 U. S. 374 . . . 43
Stepanek, Contract Carrier Application, 21 M. C. C. 612 . . . 34
Storch Trucking Co., Inc., Contract Carrier Application, 17 M. C. C. 349 . . . 25
Swift & Co. v. United States, 276 U. S. 311 . . . 8
United States v. American Trucking Associations, 310 U. S. 534 . . . 26
United States v. Carolina Freight Carriers Corp., 315 U. S. 475 . . . 15, 31, 43, 45
United States v. Chicago North Shore R. Co., 288 U. S. 1 . . . 26
United States v. Swift & Co., 276 U. S. 311 . . . 8
Virginian Ry. Co. v. United States, 272 U. S. 658 . . . 30
Wible, Contract Carrier Application, 7 M. C. C. 105 . . . 25
Wilgis, Common Carrier Application, 23 M. C. C. 87 . . . 34

Statutes:

	Page
Interstate Commerce Act, Part II:	
Sec. 203 (1) (49 U. S. C. 303 (1))	13
Sec. 203 (a) (14) (49 U. S. C. 303 (a) (14))	18
Sec. 203 (a) (15) (49 U. S. C. 303 (a) (15))	16, 32
Sec. 203 (14) (49 U. S. C. 303 (14))	49
Sec. 203 (15) (49 U. S. C. 303 (15))	49
Sec. 204 (a) (6) (49 U. S. C. 304 (a) (6))	49
Sec. 206 (49 U. S. C. 306)	41
Sec. 209 (a) (49 U. S. C. 309 (a))	3, 15, 16, 21, 24, 28, 42, 50
Sec. 209 (b) (49 U. S. C. 309 (b))	13, 17, 21, 24, 25, 26, 30, 37, 43, 44, 51
Sec. 216 (49 U. S. C. 316)	37
Sec. 217 (49 U. S. C. 317)	37,
Sec. 218 (a) (49 U. S. C. 318 (a))	37, 52
Sec. 218 (b) (49 U. S. C. 318 (b))	36, 54
Motor Carrier Act of 1935 (49 Stat. 543):	
Sec. 202 (a)	37
Transportation Act of 1940 (54 Stat. 898):	
Sec. 1	37, 48

Miscellaneous:

79 Cong. Rec. 5651	28
79 Cong. Rec. 5654	17, 27, 28, 42
79 Cong. Rec. 5664	28
86 Cong. Rec. 11546	33, 39,
Hearings, S. Committee on Interstate Commerce, S. 1629, 74th Cong., 1st sess., p. 123	28
H. Rep. No. 1645, 74th Cong., 1st sess., p. 4	32
S. Doc. No. 152, 73rd Cong., 2d sess., p. 33	37
S. Rep. No. 482, 74th Cong., 1st sess., pp. 2, 3	37

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OPINIONS BELOW

The opinion of the district court (R. 332–346) is reported in 45 F. Supp. 793. The report of the Interstate Commerce Commission (R. 14–24) appears in 28 M. C. C. 653.

JURISDICTION

The final decree of the district court was entered on July 24, 1942 (R. 349). The petition for appeal was presented on August 10, 1942, and was allowed on the same day (R. 350–351). The juris-

diction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (28 U. S. C. 45a, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)).

STATUTE INVOLVED

The relevant provisions of the Transportation Act of 1940 and the Interstate Commerce Act, Part II, are set forth in the Appendix, *infra*, pp. 48–51.

QUESTIONS PRESENTED

The Commission, acting under the so-called "grandfather" clause of Section 209 (a) of the Interstate Commerce Act, issued a permit to appellant authorizing the continuance of his operations as a contract carrier by motor vehicle, under individual contracts with "persons" who operate food canneries or meat-packing businesses, of specified commodities (canned foods, fresh meats, dairy products, and packinghouse products and supplies), in a described area. The questions presented by this appeal are:

1. Whether the Commission erred in limiting the permit by specifying the types of business for which appellant was authorized to haul.

2. Whether the Commission erred in refusing

to grant appellant a permit based on a contract which was entered into with the Kraft-Phenix Cheese Corporation prior to the "grandfather date" but under which no transportation was in fact performed until eight months later.

3. Whether the Commission unlawfully specified the territorial limits of appellant's operations.

4. Whether appellant was accorded a fair hearing.

STATEMENT

By application filed February 10, 1936, as amended, under the "grandfather" clause of Section 209 (a) of the Interstate Commerce Act, Part II, John F. Noble, doing business as Noble Transit Company of Minneapolis, Minn., sought a permit as a contract carrier by motor vehicle,[1] in interstate or foreign commerce, of general commodities, with certain exceptions, between specified points and areas in the States of Minnesota, Wisconsin, Illinois, Iowa, and North Dakota, over regular and irregular routes (R. 15). Section 209 (a) provides that if a carrier was "in bona fide operation * * * on July 1, 1935, * * * and has so operated since that time," the Commission shall issue such permit without requiring proof of consistency with the public interest.

[1] Appellant's application for a certificate as a common carrier, filed on the same day, was at his request dismissed by the Commission on October 14, 1938 (R. 2).

In his application, appellant stated that he had not undertaken "to transport property for the general public for hire"; that his contracts were with Swift & Company, Libby, McNeill & Libby, Plankington Packing Company and others, and that he was "principally engaged in the business of delivering meats and packing-house products for Swift & Company, South St. Paul, Minn., to various municipalities, towns and cities within the States of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, and is engaged under contract with various concerns in the movement of freight from Chicago and Milwaukee and adjacent towns to St. Paul, South St. Paul, Minneapolis and various points in Minnesota" (see R. 48, 56, 72.) Appellant's contract with Swift & Company was dated November 1, 1934 (R. 38, 41). He was granted a license by the Wisconsin Public Service Commission on November 24, 1934, as an interstate contract carrier, to transport the property of Swift under this contract (see R. 250).

The application received a three-day hearing before Examiner Peterson at St. Paul, Minn., on September 21–23, 1938, at which hearing considerable testimony and numerous exhibits were introduced (R. 31–330). Appellant testified that he began operation in November 1934, and at that time entered "in the field of contract carrier working for Swift & Company," packers (R.

38). He stated that he operated out of South St. Paul, Minneapolis and St. Paul to various points and places in Wisconsin, Iowa, Illinois and North Dakota, and from various places in Illinois, Iowa, and Wisconsin to various places in Minnesota, and from Iowa to places in Illinois, and that he hauled fresh meats, packing-house products, canned goods, butter, eggs, and supplies of all kinds such as machinery, chemicals, and articles too numerous to mention, referred to as branch house supplies (R. 48). He further testified that his schedule was irregular and that "The service was one of supplementing rail service at the time, depending upon which they wanted to use, whether they wanted to send the trucks to those places, or use rails." In November 1934, he operated two trucks. (R. 49.) The witness referred to a contract with Libby, McNeill & Libby and to a contract with the Kraft-Phenix Cheese Corporation, the latter entered into about June 1, 1935, and under which operations were not conducted until March 1936 (R. 55–57). He testified that there was no other industry for ~~whom~~ which he was performing transportation service prior to July 1, 1935, and that there was no other industry for ~~whom~~ which he performed a transportation service or with ~~whom~~ which he had any agreement, verbal or otherwise, after July 1, 1935, and prior to January 1, 1936 (R. 57).

Much additional evidence was introduced at this hearing, after which briefs were filed by appellant and by protesting motor carriers. On December 5, 1939, the examiner who heard the case recommended to the Commission that it find appellant was entitled to continue operation as a contract carrier of fresh meats, packing-house products, packing-house supplies, canned goods and dairy products, over irregular routes from and to certain points in Minnesota, Wisconsin, Illinois and Iowa, by reason of having been engaged in such operations on July 1, 1935, and continuously since then (see R. 3–4). Exceptions were filed by Noble to the examiner's recommended report and competing carriers replied thereto (R. 15).

On May 13, 1941, Division 5 of the Commission rendered its decision (R. 14–15). Appellant filed a petition for reconsideration by the entire Commission (see R. 348), replies thereto were filed, and the Commission, on October 6, 1941, denied the petition (R. 25). Shortly thereafter this suit was brought to set aside the order of the Commission (R. 1). Pending disposition of the proceedings in the district court, the Commission has from time to time, at the request of the court, extended the effective date of its order, and following the decision of the court sustaining the Commission's order (R. 349), a stay order was granted pending determination by this Court (R.

357). Accordingly, the Commission's decision has not yet become effective.

In its report the Commission found that appellant commenced operations in November 1934, as a motor carrier with two trucks under a written contract with Swift & Company, a meat-packing concern, with a plant at South St. Paul, Minn.; appellant was to receive from Swift or its subsidiaries such quantities of their goods as were tendered. No points or territory were specified in the contract, nor were rates quoted or named. The Commission found that the effect of the contract was to place appellant's two trucks at the disposal of Swift and its subsidiaries for use within its South St. Paul trade or shipping area and also out of its Chicago plant, and that he hauled truckloads of "plant sales" under seal from the South St. Paul plant to Swift branch houses and to certain so-called break-bulk points where the commodities were unloaded for subsequent local delivery or reshipment to consuming points by local truckers. (R. 16.) In February 1935, he accepted a further proposal from Swift to extend his operations to provide a through trucking service to the consumer, rather than to turn the shipments over to local carriers at break-bulk points (R. 16); he rebuilt his old equipment and acquired new equipment so that he could perform this highly specialized service. The new service to points beyond the break-bulk

points was not commenced until October 16, 1935, and was thereafter extended to various routes was established by Swift. The last of these routes was instituted in August 1937, long after July 1, 1935, the critical date under the "grandfather" clause. (R. 17.)

It was found that appellant commenced hauling canned goods in February 1935, under a written contract with Libby, McNeill & Libby, of Chicago.[2] Libby is engaged in the canning of foods, and operates a plant at Blue Island, Ill., a locality in the Chicago area. The operations for Libby were performed in conjunction with the Swift operation and all routing and other directions pertaining to the Libby operation were given by Swift. (R. 16.)

A third contract, between appellant and Kraft-Phenix Cheese Corporation, was referred to by the Commission in its report (R. 17). Although entered into on June 1, 1935, no actual operations were performed for Kraft until March 1936, long after the "grandfather" date of July 1, 1935. The Commission rejected this contract as evidence of a "grandfather" operation (*ibid.*) because, as it said:

---

[2] In 1935 the stock of Libby, McNeill & Libby was owned by Swift & Co., although its divestment had been ordered by the Packers' Consent Decree of February 27, 1920. See *Swift & Co.* v. *United States*, 276 U. S. 311, 318; *United States* v. *Swift & Co.*, Sup. Ct., D. C., Eq. No. 37623, Orders of July 8, 1933, November 18, 1939, April 23, 1941, July 29, 1941.

> Mere intention, plans, preparation, or attempts to operate, even though bona fide, do not constitute operation within the meaning of that phrase in section 209 (a) of the act, and having been instituted subsequent to the effective date of the act and being beyond the scope of appellant's "grandfather" rights as hereinafter found, the service rendered this shipper has constituted an unauthorized extension of operations (R. 17).

The Commission's report described appellant's operations on the critical date as consisting of rendering a specialized transportation service in hauling packing-house products, and it discussed in detail the commodities he handled (R. 17–21). Reference was made to the wide diversification of these products, and the finding was made that "All traffic handled by applicant prior to the statutory date and until October 15, 1935, was transported for Libby or for Swift or one of its subsidiaries. Likewise, all of his equipment has refrigerator bodies" (R. 21).

In reaching a conclusion as to the best manner of describing appellant's operations, the Commission pointed out that while he had transported a wide range of commodities, "the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products and supplies in the manner hereinbefore described" (R. 22).

Stating that the same problem was presented as that involved in *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475, the Commission adopted the general form of authority used in that case "with appropriate modifications" (R. 22). In the *Keystone* case the Commission had considered 122 applications. The operations of the applicants in that case were for the American Stores Company and for the Great Atlantic & Pacific Tea Company, and the Commission concluded that the permit granted should be restricted to the service of persons operating retail stores, the business of which is the sale of food.[3]

The Commission then considered the territorial scope of appellant's operations and found that they have been essentially between specific points, with large volumes of traffic moving between those points (R. 23). The Commission's ultimate findings were:

> We find that on July 1, 1935, and continuously since, applicant has been in bona fide operation as a contract carrier by motor vehicle in interstate or foreign commerce under individual contracts with persons (as defined in section 203 (a) (1) of the act) who operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul,

[3] This restriction with respect to the classes of shippers which might be served has become known in the motor carrier industry as the Keystone restriction.

South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul, to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.; over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations; and that in all other respects the application should be denied (R. 23).

An appropriate order to carry out the findings of the Commission was entered (R. 24) on the same day (May 13, 1941) as the decision. This suit was brought (R. 1) following denial by the entire Commission of a petition for reconsideration on October 6, 1941 (R. 25). The principal allegations of the complaint were that the Commission erred as a matter of law in restricting appellant to contract operations with shippers of certain classes, and with respect to specific commodities for said classes of shippers, resulting in a discrimination against contract carriers by motor vehicle in favor

of common carriers by motor vehicle; that the decision unlawfully prohibited his substituting or adding shippers other than packing houses and food canneries; that the examiner and the Commission erred in excluding evidence as to his operations; that the Commission's action on the Kraft contract was erroneous; and that a fair hearing was denied (R. 5–8).

Answers were filed by the Commission and by the United States denying the material allegations of the petition. Interventions were filed in support of the order by the Common Carrier Division of the American Trucking Associations, Inc. and the Illinois-Minnesota Motor Carriers' Conference, and in support of the relief sought by the Contract Carrier Division of the American Trucking Associations, Inc. The Kraft-Phenix Cheese Corporation also intervened on behalf of the appellant (R. 333).

The case was fully considered by the statutory court below, which devoted two days to the argument (R. 349) and, on July 24, 1942, filed an opinion, sustaining the Commission in all respects (R. 332-346). By its findings of fact and conclusions of law, entered on the same day (R. 346), the court affirmed the findings of the Commission as being within its statutory authority and supported by substantial evidence. On August 12, 1942, the court below stayed the Commission's order pending appeal to and determination by this Court (R. 357).

SUMMARY OF ARGUMENT

I

Appellant filed with the Interstate Commerce Commission an application for a permit as a contract carrier by motor vehicle. Following full hearings, the Commission found that appellant, under individual contracts, performed services during the "grandfather" period for the food canneries or meat-packing businesses of Swift & Company and Libby, McNeill & Libby by transporting in a described area "canned foods, fresh meats, dairy products, and packing-house products and supplies", the last classification embracing a wide and diversified character of commodities incidental to the main business of meat packing or food canning. Acting under the authority contained in Section 209 (b) of the Interstate Commerce Act to "specify in the permit the business of the contract carrier covered thereby and the scope thereof", the Commission found that appellant, as a contract carrier by motor vehicle, should be granted a permit to do what the evidence showed he had done during the "grandfather" period, namely, to transport the above-named commodities in the area described for "persons" (as defined in the Act)[4] who

[4] Section 203 (1) (49 U. S. C. 303 (1)) provides that—

"The term 'person' means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof."

"operate food canneries or meat-packing businesses".

It is argued that the court below improperly held that the Commission was authorized to limit the permit to a particular class of shippers (persons who operate food canneries or meat-packing businesses), but an analysis of Section 209 of the Act reveals that the Commission was empowered to make such a limitation. If appellant were permitted to transport the widely diversified commodities falling within the generic term "packing-house products and supplies" for anyone in this populous territory, he would be converted from a contract carrier, the category in which he voluntarily asked the Commission to be placed, to a common carrier (one which holds itself out to transport for the public generally). And under such a permit giving appellant unrestricted rights as a contract carrier of "canned goods, fresh meats, dairy products, and packing-house products and supplies," appellant would be within his rights in abandoning entirely his past highly-specialized refrigerated service for packing houses and canners and invading the service fields of other carriers, both common and contract, so long as he hauled one of the diverse commodities used or sold by packers or canners.

II

The Commission did not err in refusing to permit operations under a contract with the Kraft-

Phenix Cheese Corporation. On June 1, 1935, prior to the "grandfather" date, appellant entered into a contract with Kraft to perform its transportation service. No transportation was performed under that contract until March 1936, eight months later. Consequently, the Commission held that the phrase "bona fide operation" in the "grandfather" clause (sec. 209 (a)) did not encompass operations which were merely planned or intended to be performed at some time in the future. Mere intention to operate is not enough. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480; *McDonald* v. *Thompson*, 305 U. S. 263, 266; see *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 83. Furthermore, after the decision of the lower court in this case, appellant was authorized by the Commission to perform operations under the contract with Kraft. *Noble Extension of Operations—Points in Illinois, Wisconsin and Minnesota*, 34 M. C. C. 671.

III

Recent decisions of this Court have so clearly sustained the authority of the Commission to impose territorial limitations in grants of motor-carrier operating rights that further discussion seems unnecessary. *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. Moreover, the reason for the imposition of the terri-

torial limitations herein is fully explained in the Commission's report and does not appear to be seriously questioned.

IV

A full and fair hearing was granted. The hearing before the Commission extended over 3 days; appellant filed a brief, exceptions to the recommended report, and in his petition for reconsideration, following the decision of Division 5, he advanced fully his reasons why the petition should be granted. Due process was satisfied; oral argument is not a prerequisite to due process. *Morgan* v. *United States*, 298 U. S. 468, 481.

ARGUMENT

I

THE COMMISSION PROPERLY LIMITED THE PERMIT BY SPECIFYING THE TYPES OF BUSINESS FOR WHICH APPELLANT WAS AUTHORIZED TO HAUL

Introductory.—Section 209 (a) of the Interstate Commerce Act provides that no person shall engage in the business of a contract carrier by motor vehicle[5] in interstate commerce without a permit issued by the Commission authorizing the

[5] Section 203 (a) (15) (49 U. S. C. 303 (a) (15)) provides: "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

operation. The "grandfather" clause of that Section declares that if a carrier "was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, * * * and has so operated since that time," the Commission shall issue a permit without requiring proof that the operation will be consistent with the public interest and the policy of the Act (see 79 Cong. Rec. 5654). Section 209 (b) covers in part operations instituted after the "grandfather" date and provides for the issuance of a permit upon proof by the applicant that it is fit, willing, and able to perform the proposed operation and that the proposed operation will be consistent with the public interest and the national transportation policy. This Section also contains the following provision, involved here:

> * * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under sections 204 (a) (2) and (6): *Provided however* that no terms, conditions, or limitations shall restrict the right of the carrier to

substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

A contract carrier by motor vehicle is one which engages in transportation under individual contracts or agreements (see n. 5, *supra*, p. 16). A common carrier by motor vehicle[1] is one which holds itself out to the general public. These distinctions are of importance in this case (see *infra*, pp. 35–39).

The essential characteristic of the individual contract or agreement between a contract carrier and a shipper is the integration of the carrier's operations with the shipper's business, as the present record strikingly illustrates. A very substantial part of Swift's transportation need, for example, is the distribution of its products and the transfer between its various plants of centrally

[1] Section 203 (a) (14) (49 U. S. C. 303 (a) (14)) provides: "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

purchased supplies and materials. Swift could accomplish this distribution through its own equipment as a private carrier, but for satisfactory reasons it chooses not to do so. Swift could also distribute through the medium of common carriers, but common carriers are at the beck and call of the general public and Swift consequently finds it more convenient to perform the transportation part of its business through an independent contractor who undertakes for compensation to haul subject to Swift's directions.

The contract carrier is characterized by the rendition of a service which meets the peculiar needs of a particular shipper and which results in a specialization not to be found in the service rendered by a common carrier. Such transportation service is normally rendered, as in this case, for one or two shippers, the carrier becoming in effect a part of the business of the shippers it serves. The contracts which appellant entered into with Swift and Libby typify the individual contract which distinguishes the contract carrier.[7]

[7] The subject of contract carriers is fully discussed in *Contracts of Contract Carriers*, 1 M. C. C. 628; *Filing of Contracts by Contract Carriers*, 2 M. C. C. 55; *Craig, Contract Carrier Application*, 28 M. C. C. 629; *Doudell, Contract Carrier Application*, 17 M. C. C. 684. In the *Craig* case, the Commission said (pp. 633–634):

"* * * As we have already indicated, the most obvious case of a contract carrier is one rendering a highly specialized service meeting the peculiar needs of a particular shipper under a contract which speaks with relation to the existing

A. SECTION 209 OF THE INTERSTATE COMMERCE ACT EMPOWERS THE COMMISSION TO LIMIT "GRANDFATHER" PERMITS TO THE CLASS OF SHIPPERS SERVED

The Commission found that on July 1, 1935, appellant was engaged in the business of transporting certain commodities for Swift & Company, a packing house, and Libby, McNeill & Libby, a food cannery, under individual contracts with them, and that he has continued that business since the "grandfather" date (R. 23).

Appellant's principal operations under these contracts with Swift and Libby were found to have consisted in rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul, Minnesota, for deliveries to Wisconsin points, following which the truck proceeded to Chicago or Blue Island (a point in the Chicago area) to pick up loads at the plants of Swift or Libby for Minnesota delivery (R. 17, 21). The shipments

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situation. On the other hand, as the degree of specialization diminishes and as the number of shippers served increases, a general holding out to serve the public, or a class or classes thereof, becomes evident, and the operation approaches that of a common carrier.

* * * * * *

"Of course, in the final analysis both these criteria, specialization and number of shippers served, relate back to the fundamental question of holding out. One who proposes or offers a specialized service fitting the needs of a particular shipper or shippers has nothing to hold out to the public generally. On the other hand, the making of a large number of contracts, while not conclusive, strongly suggests a general holding out in the absence of some explanation."

from Blue Island were found to have consisted only of canned foods, but from Chicago and South St. Paul they were found to have consisted of canned goods, meats, various packing-house products, dairy products, and innumerable supplies used in conjunction with the manufacture or distribution of those products (R. 21). While the Commission acknowledged that appellant had transported a wide range of commodities, it also found that "the service rendered by applicant has not been similar to that of a common carrier of general commodities, but rather that of a carrier of canned foods, packing-house and related products and supplies in the manner hereinbefore described" (R. 22).

When the Commission determined that appellant was a "grandfather" contract carrier and entitled to the issuance of a permit to continue that business in which he was engaged on July 1, 1935, the problem arose as to the specifications to be included in the permit. The duty of the Commission to find from the evidence whether or not appellant was in *bona fide* operation as a contract carrier (sec. 209 (a)) is not the only burden imposed upon the Commission by the statute, for Section 209 (b) states that—

> * * * The Commission shall specify in the permit the *business* of the contract carrier covered thereby and the *scope* thereof * * *. [Italics supplied.]

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The Commission must, from the evidence, ascertain the nature of the business and specify or describe that business in the permit. Because appellant handled such widely diversified commodities as empty hogsheads, broken glass, hoops, thermometers, soap, bolts, gate locks, stationery, etc. (R. 21), he contends (Br. 12, 41) that the carriage of these widely miscellaneous articles made him a carrier of general commodities. These numerous commodities, all includible in the term packing-house supplies, were, however, carried only as an incident to the operation under the individual contracts between him and the two shippers served (R. 16, 21).

Consequently, the Commission, weighing the evidence before it, determined that the proper permit for appellant was as a contract carrier by motor vehicle, in a described area, of certain commodities under individual contracts with persons "who operate food canneries or meat-packing businesses" (R. 23). As a basis for this order, the Commission relied on the authority conferred on it by the statute to "specify in the permit the business of the contract carrier covered thereby and the scope thereof;" it said (R. 22):

> * * * The question of the form of authority to be granted to contract carriers of retail-food store commodities was considered at length in *Keystone Transp. Co. Contract Carrier Application,* 19 M. C. C.

476, and the same problem with respect to defining the business of applicant and scope thereof is here presented. In granting authority herein, we shall accordingly adopt the general form of authority used in the cited case with appropriate modifications.

In the *Keystone* case, *supra*, the Commission stated (p. 493):

> The phrase "the business of the contract carrier * * * and the scope thereof" plainly means more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and *precise character of the service* to be rendered by such carrier. When so considered, it is clear that we have power to incorporate in a permit the territory or points to be served, the commodities to be transported, the equipment to be used; and any other specification necessary to describe the service authorized, even to the extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store. [Italics supplied.]

And Chairman Eastman stated in his concurring opinion in the *Keystone* case (p. 499):

> * * * the phrase "the business of the contract carrier * * * and the scope

thereof" means more than "just the business of being a contract carrier within a defined territory" and connotes in addition the "exact and precise character of the service to be rendered by such carrier." If * * * the "exact and precise character" of that service can sometimes be closely and accurately defined only by reference to the class of shippers that was being or is to be served, there is nothing whatever in the act which precludes us from so defining it, and in fact it is our duty to do so.

B. ANALYSIS OF SECTION 209

Appellant contends (Br. 24–25) that the statutory direction to the Commission to "specify in the permit the business of the contract carrier covered thereby and the scope thereof" (paragraph (b) of sec. 209) is applicable only to new operators and not to "grandfather" applicants. We think it clear, however, that the Act contemplates no different permits in the case of new applicants than in the case of "grandfather" clause applicants, and that any restriction or limitation on the authorized business or operations of an applicant may, where consistent with the operation on the critical statutory date, be employed in a "grandfather" clause permit.

Appellant's contention is answered by the language of Section 209. Contract carrier operations are prohibited by paragraph (a) thereof "unless there is in force * * * a permit is-

sued by the Commission." The "grandfather" clause which immediately follows provides that "such permit" shall be issued. It is therefore readily apparent that only one type of permit is contemplated. Furthermore, the "grandfather" clause is expressly linked to paragraph (b) since the permit is to issue "if application for such permit was made to the Commission as provided in paragraph (b)."

The Commission has consistently interpreted the two paragraphs as being interrelated in cases holding that the phrase "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof" (sec. 209 (b)) applies to "grandfather" permits, and that such permits should thus be limited to the territories served and commodities carried[*] before July 1, 1935, the date on which "grandfather" rights crystallized. *Motor Convoy, Inc., Contract Carrier Application,* 2 M. C. C. 197; *Wible, Contract Carrier Application,* 7 M. C. C. 165; *Caravans, Inc., Contract Carrier Application,* 9 M. C. C. 659; *Hunter, Contract Carrier Application,* 13 M. C. C. 109; *Storch Trucking Co., Inc., Contract Carrier Application,* 17 M. C. C. 349; *Marine Trucking Co., Inc., Contract Carrier Application,* 17 M. C. C. 615. Where, as

[*] Appellant really admits that the paragraphs are interrelated since he does not challenge the Commission's power to restrict permits in this respect.

here, there has been a settled construction of a statute by the administrative authorities entrusted with its application, such construction will not be lightly disturbed by the courts. See, *e. g., Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488. It has been held that this is especially true of constructions by the Commission of the language of the Motor Carrier Act in view of the fact that the Commission proposed it to Congress. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

Under the doctrine of the cases, *supra*, p. 25, holding that the permit specification clause of Section 209 (b) applies to "grandfather" carriers, there is no incongruity in specifying in the permit the type of business served by the applicant before the "grandfather" date, and the Commission has followed this practice in appropriate cases consistently since 1939.* *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475; *Marianelli, Contract Carrier Application*, 22 M. C. C. 142; *Koelker, Contract Carrier Application*, 22 M. C. C. 474; *Shipman Bros. Transfer Co., Contract Carrier Application*, 23 M. C. C.

* *Longshore, Contract Carrier Application*, 2 M. C. C. 480, which appellant cites as holding to the contrary (Br. 10, 28), was decided in 1937 and is discussed, *infra*, pp. 30–31.

355; *Red Circle Freight Lines, Inc., Contract Carrier Application*, 24 M. C. C. 319; *Puzio, Contract Carrier Application*, 26 M. C. C. 555; *Knight, Contract Carrier Application*, 30 M. C. C. 500. The reenactment of Section 209 without change in the Transportation Act of 1940 after its prior construction by the Commission is a persuasive indication of Congressional approval. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114, 115; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488.

Appellant asserts (Br. 48–49) that the legislative history of Section 209 reveals that the Commission may not restrict a contract carrier's operations to the type of business served. Reliance is placed on an amendment to Section 209 (b) by the Senate Committee on Interstate Commerce. As introduced, the pertinent part of that Section read:

> * * * The Commission shall specify in the permit the operations covered thereby. * * *.

However, the Senate Committee on Interstate Commerce amended the Section by adding "and the scope thereof" and by substituting "business of the contract carrier" for "operations". 79 Cong. Rec. 5664. The amendment was agreed to, and the Section thus provides:

> * * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof * * *.

Obviously, the changes gave the Commission wider latitude in determining the proper specifications for a permit than did the bill as introduced.[10]

The following statement by Senator Wheeler is cited as calling for a contrary conclusion:

> * * * This section [Section 209] has been changed in lines 19–22, page 27,[11] to make clear that the bill applies to the business of contract carriers and *not merely* to particular operations under the individual contracts. [Italics supplied.] (79 Cong. Rec. 5654.)

Since the Senator was speaking of the first sentence of Section 209 rather than of the permit specification clause (see 79 Cong. Rec. 5664), he was explaining that the bill as a whole was intended to have a broad application. A potential loophole was being closed. Even had the Senator been referring to the permit specification clause, the quotation would not militate in the slightest degree against the construction adopted

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[10] These changes were evidently made at the Commission's request. See Hearings, S. Committee on Interstate Commerce, S. 1629, 74th Cong., 1st sess., p. 123; 79 Cong. Rec. 5651.

[11] This amendment altered Section 209 (a) as follows:

"Sec. 209 (a). No person shall engage in [any] *the business of a contract carrier by motor vehicle in* interstate or foreign [operation] *commerce* on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit * * *." (79 Cong. Rec. 5664.)

by the Commission and the court below. As the Commission stated in *Keystone Transp. Co., Contract Carrier Application,* 19 M. C. C. 475, 492–493:

> Here again there is no confusion of thought, but merely a clear statement of our powers and duties in connection with the granting of permits by either of the two methods above mentioned. First, we shall specify in the permit "the business of the contract carrier covered thereby and the scope thereof." The phrase "the business of the contract carrier * * * and the scope thereof" plainly means more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier. When so considered, it is clear that we have power to incorporate in a permit the territory or points to be served, the commodities to be transported, the equipment to be used, and any other specification necessary to describe the service authorized, even to the extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store.
>
> This construction is not a strained or unnatural one and does not conflict with the expression of Senator Wheeler above referred to. Obviously the business of all contract carriers is not the same. * * *

It is also said (Br. 26) that the so-called restriction would impinge on appellant's right under Section 209 (b) "to substitute or add contracts within the scope of the permit" to be granted. The words "within the scope of the permit" are controlling. Actually, this provision of Section 209 (b) does not come into operation until "the scope of the permit" to which an applicant is entitled has been determined. If the circumstances surrounding appellant's past operations are such as to justify and require imposition of the restriction in question, then the "scope of the permit" is correspondingly limited, but there is no diminution of the right to substitute or add contracts "within the scope of the permit." Appellant will remain as free as ever to substitute or add as many contracts as he chooses within the specialized field in which he has long since elected to operate.

The claim is made (Br. 10, 14, 28–39) that the Commission's decision in *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475, is in conflict with its decision in *Longshore, Contract Carrier Application*, 2 M. C. C. 480. The *Longshore* case was decided early (July 23, 1937) in the Commission's administration of the Motor Carrier Act, 1935, while the Act was still in the experimental stage. Greater experience under the Act would not prevent the Commission from reaching an opposite conclusion. Cf. *Vir-*

ginian Ry. Co. v. *United States*, 272 U. S. 658, 663. But the two decisions are reconcilable, as recognized by the district court, which said: "the facts in that case [*Longshore* case] were such as not to require a specification of the class of shippers, as a permit without such limitation would not enable the carrier under the circumstances to extend his operations to the transportation of general commodities for a large number of shippers" (R. 342), and further:

> The inherent nature of the business in the Longshore case constituted an effective restriction, while the same specification in the business in the Keystone case as that adopted in the Longshore case would have permitted the carrier to engage in the transportation of general commodities for all shippers. While the specification of the business in the Longshore case was suitable under the facts in that case, it did not meet the requirements of the Keystone case. In the Longshore case the Commission went as far as it needed to go under the circumstances while in the Keystone case it was required to impose an additional limitation to avoid authorizing the transportation of general commodities for all shippers. In the instant case the Commission undoubtedly followed its decision in the Keystone case because of the similarity of facts. (R. 342.)

Appellant (Br. 31, 36, 41, 60) relies upon this Court's decision in *United States* v. *Carolina*

Freight Carriers Corp., 315 U. S. 475. That case, however, dealt with common carriers, not with contract carriers, and in no way impugned the previous decisions of the Commission relating to the latter. The provisions of the Motor Carrier Act regulating common carriers (secs. 206–208), upon which the *Carolina* decision turned, are quite different from those regulating contract carriers; and they do not contain the language of Section 209 involved in the case at bar. Congress has carefully differentiated between the two classes of carriers, and extension of the holding in the *Carolina* case to contract carriers would serve to nullify the distinction which Congress has recognized and the Commission correctly applied. See *infra*, pp. 36–39; see also H. Rep. No. 1645, 74th Cong., 1st sess. p. 4.

It is urged (Br. 29, 32) that because of a statement in the Commission's report in the *Keystone* case, *supra*, concerning a restriction similar to that involved here, the Commission is trying to regulate contract carriers generally for the benefit of common carriers. But the only portion of the *Keystone* report that is relied upon in this case is an

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It is said (Br. 18, 45–46) that Congress disapproved the *Keystone* case by removing the word "special" when in the Transportation Act of 1940, it amended Section 203 (a) (15) to read:

"The term 'contract carrier by motor vehicle' means any person [, not included under paragraph 14 of this section, who or] which, under [special and] individual contracts or agreements, [and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.] *en-*

affirmance of the Commission's interpretation of Section 209 (b) as to the form and scope of the permit. Not a word is said herein about regulating contract carriers for the benefit of common carriers. The *Keystone* case, based on a different record, is not of course in issue here, nor was its holding ever attacked in court. The Commission is not attempting to regulate contract carriers for the benefit of common carriers, but its regulation of any particular type of carrier is in part for the protection of all other carriers, both common and contract.

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gages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation." (54 Stat. 920.)

Congress had no such intent, as is made plain in the following statement on the floor of the Senate by Senator Truman, who was a member of the Senate Committee on Interstate Commerce and a sponsor of the Transportation Act of 1940:

"The conferees wish to make it plain that it is not their intention, by changing the language of paragraphs (14) and (15) of section 203 to change the legislative intent of the Congress one iota with respect to definition of common and contract carriers other than those performing pick-up, delivery, and transfer service. It is intended that all over-the-road truckers shall whenever possible fall within the description of common carriers.

"It is intended by the definition of contract carriers to limit that group to those who operate under individual contracts and who render a specialized service which is required by the peculiar needs of a particular shipper and who do not come within the definition of common carriers." (86 Cong. Rec. 11546.)

C. TO SATISFY THE POLICY OF THE ACT, THE "GRANDFATHER" PERMIT INVOLVED MUST BE RESTRICTED TO THE CLASS OF SHIPPERS SERVED.

If the business of a contract carrier could not be defined by reference to the class of shippers served, companies transporting many types of commodities under contract with a single chain store operator (as in the *Keystone* case), or for one or two manufacturing concerns dealing in many products (such as Swift in the present case), would be entitled to the equivalent of a general license allowing them to carry all such commodities for all shippers. In such circumstances, a permit not limited to the class of shippers under contract on the "grandfather" date [13]

[13] The following are examples of limitations as to the type of shippers for whom transportation may be rendered: "persons * * * who operate wholesale grocery houses, the business of which is the sale of food, of such merchandise as is dealt in by wholesale food business houses", *Jones, Extension of Operations*, 21 M. C. C. 470; "persons * * * who operate chain retail and mail-order department stores, the business of which is the sale of general commodities, of such commodities as are dealt in by such stores", *Stepanek, Contract Carrier Application*, 21 M. C. C. 612; "persons * * * who operate chain department stores, of such commodities as are dealt in by such stores", *Koelker, Contract Carrier Application*, 22 M. C. C. 474 ("grandfather" rights); "persons * * * who operate chain retail and mail-order department stores, the business of which is the sale of general commodities, of such commodities as are dealt in by such stores", *Inter-City Transport & Motor Co., Extension of Operations*, 22 M. C. C. 588; "persons * * * who operate retail department stores, of such merchandise as is dealt in by such stores", *Wilgis, Common Carrier Application*, 23

would not accurately define the scope of an applicant's prior operations or preserve the "parity between future operations and prior *bona fide* operations which the statute contemplates." *Alton R. Co.* v. *United States*, 315 U. S. 15, 22.

The Commission necessarily must have the authority to prescribe such limitations in a contract carrier's permit as will correctly specify its business and guarantee that the contract carrier operation will not be converted into common carriage. It would not be sufficient for the Commission to specify appellant's business as being that of a contract carrier without further limitation. His business cannot be accurately described in terms of the diversified commodities transported but only in terms of the service provided, *viz.*, service rendered persons "who operate food can-

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M. C. C. 87; "persons * * * who operate meat-packing houses, the business of which is the sale of meat and packing-house products * * *, of meat and packing-house products, and of advertising material used to promote the sale of these commodities", *Clancy, Common Carrier Application*, 24 M. C. C. 727 ("grandfather" rights); "persons * * * who operate wholesale electrical supply houses, the business of which is the manufacture or sale of electrical supplies, of such commodities as are dealt in by wholesale electrical supply houses" and "persons * * * who operate wholesale bakers' supply houses, * * * of such commodities as are dealt in by wholesale bakers' supply houses", *H. B. Church Truck Service Co., Common Carrier Application*, 27 M. C. C. 191 ("grandfather" rights); "persons who operate meat-packing plants, and their subsidiaries, of such merchandise as is dealt in by meat-packing companies and their subsidiaries", *Beckley, Contract Carrier Application*, 27 M. C. C. 405 ("grandfather" rights).

neries or meat-packing businesses" (R. 23). Unless appellant is limited to the actual function performed, described in terms of the dominant business served, he will be able to change or expand his past operations and invade the service fields of other carriers, both common and contract, without any proof of consistency with the public interest. In fact, in the complaint filed in this case, appellant alleges he has entered into 120 contracts, 83 still in force, to transport the same commodities which had been transported under contracts for Swift and Libby (R. 11; see Br. 6). This allegation illustrates how a contract carrier, restricted only to commodities, could transform itself into a common carrier, operating under a contract carrier permit and free from the more exacting statutory requirements of common carriers."

Under the provisions of Section 218 (b), the Commission is required, in considering minimum charges, to see that no advantage should be given

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"Quite obviously, if, upon the hearing before the Commission, appellant had denied that he was limiting or restricting his business to a class of shipper and certain commodities, he would have been compelled to take the position that he was offering this service to all shippers, and hence, would have been classified as a common carrier. The record contains his own statement that he was a *contract* carrier (See R. 38, 57, 199, 200). Appellant wished to continue as a contract carrier because he had the benefit of filing low minimum schedules of rates, an advantage over common carriers with fixed maximum and minimum rates.

to contract carriers in competition with common carriers, who must, under Sections 216 and 217, publish and observe specific rates, accept all tendered shipments and charge the same rate to all persons, under severe penalties for violations. Congress applied no such stringent regulations to contract carriers who may charge a different rate to one shipper than to another and refuse to accept any shipment not desired. They may refuse service to any shipper or to any community in the territory served. Common carriers cannot. The restraint which Congress did provide for contract carriers, obviously to avoid unrestrained competition that would destroy motor carrier efficiency (see the declarations of policy in the Motor Carrier Act, 1935 (sec. 202 (a), 49 Stat. 543) and the Transportation Act of 1940 (sec. 1, 54 Stat. 898); see also S. Rep. No. 482, 74th Cong., 1st sess., pp. 2, 3; S. Doc. No. 152, 73rd Cong., 2d sess., p. 33), is to be found in the requirement of Section 209 (b) that the scope of the business be specified in the permit, and in the requirement of Section 218 (a) that the minimum rates be published.

In addition to the possibility of his becoming a common carrier, appellant, if entitled to unrestricted operating rights as a contract carrier of "fresh meats, canned goods, dairy products, and packing-house products and supplies" (R. 23), would be within his rights in abandoning

entirely his past highly specialized refrigerated service for packing houses and canners, and in invading the service fields of other carriers, both common and contract, so long as he hauled one of the diverse commodities used or sold by packers or canners. Thus with ordinary (rather than refrigerated) equipment, he might abandon the packers and canners and, without any proof of consistency with the public interest, begin hauling sugar (which is used by packers to some extent and is therefore a packer's "supply") for a sugar producer, or machinery, such as cooling equipment, for a manufacturer thereof, cans for a can producer, or fertilizer (a packer by-product) for a chemical company, regardless of the adequacy of the services of other carriers who are now serving such shippers.[15]

It is accordingly seen that there were substantial reasons why Congress separately treated common and contract carriers, and there is every

[15] As the court below said:

"* * * If the plaintiff is not limited to serving the classes of shippers with whom he had contracts on the crucial date he could engage in the transportation of an extensive list of goods, wares and merchandise for all shippers. The theory of the plaintiff may be illustrated, as follows: He hauled some paints, some articles of clothing and some hardware for Swift on the crucial date; therefore, he now has the right to haul paint for any paint manufacturer, clothing for any clothing merchant and hardware for any hardware dealer. Such elasticity is not contained in the grandfather clause and such a construction would prevent effective regulation of the transportation industry. (R. 343.)

public reason why the contract carrier should be limited to its field. This limitation is not one in the interest of the common carrier as against the interest of a contract carrier. It rests entirely upon the paramount consideration of the public interest. See 86 Cong. Rec. 11546.

Where only a few commodities are involved, a description in a permit in terms simply of commodities which may be transported and territory which may be served is ordinarily adequate. In situations like the present, however, where a vast number of diversified commodities is to be transported, a permit, in terms of commodities and routes alone, allows far too much flexibility and other qualifying terms are accordingly required.

After full consideration, the court below sustained the Commission's construction of the law and its authority to specify in the permit the business of the contract carrier and the scope thereof, so as to include shippers for whom the service was rendered, saying:

> Authority is expressly vested in the Commission, as we have observed, to "specify in the permit the business of the contract carrier covered thereby and the scope thereof." This is a significant provision of the Act and its interpretation is decisive of the principal issue in this case. The permit constitutes the carrier's authority to do business and the specifica-

> tions in the permit fix the limitations of the business; it may range from very limited to very extensive operations. The Act does not stop with conferring power to specify the business; it expressly adds the power to specify the scope of the business. There was a purpose in this additional provision. * * * The Commission has ample authority under the Act to designate the classes of shippers that may be served in addition to the classes of property that may be transported, in specifying the business and the scope thereof, if it is necessary or convenient to do so. The business of the shipper may be described in the permit if it thus can be made more accurately to define the limitations of the business of the carrier. (R. 340–341.)

Appellant is free to continue to haul for the shippers which he was serving on the "grandfather" date, and still serves, and under his "grandfather" permit he may substitute or add contracts of shippers in similar businesses. If he can show that his operation as a contract carrier in other fields would be consistent with the public interest, a permit may issue under the provisions of Section 209 (b). See *infra*, p. 44.

Appellant wishes, however, to be free to enter those other fields not as a new operator under Section 209 (b), but on the basis of his "grandfather" rights and without proof of any need for those new operations or of their consistency with the public interest or the national transportation

policy. To permit entrance into those other fields under the "grandfather" clause would be to permit him to engage in operations distinctly different from the specialized services rendered for Swift and Libby on the "grandfather" date. In *Alton R. Co. v. United States*, 315 U. S. 15, 23, this Court said:

> The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission, not the courts.

Should the Commission grant to each of the large number of contract carriers who have engaged in a highly specialized service for a particular type of shipper a permit which would authorize each of them, despite the limited character of their past operations, to engage in virtually unlimited operations, it would not only be contrary to the intent of the "grandfather" clauses of the Act, but would substantially annul the certificate and permit requirements of Sections 206 and 209, in certain derogation of a sound and adequate transportation system.

II

THE COMMISSION'S ACTION WITH RESPECT TO THE KRAFT-PHENIX CHEESE CORPORATION CONTRACT IS CORRECT.

Appellant entered into a contract with Kraft on June 1, 1935, but conducted no operations

thereunder until March 1936. The Commission refused to include this contract as a part of appellant's "grandfather" rights on the ground that the mere existence of a contract to operate did not constitute *bona fide* operation within the meaning of Section 209 (a). (R. 17.) This conclusion is challenged on the grounds that non-operation for Kraft was an interruption of service over which appellant had no control, and that the refusal of the Commission to authorize operation under the Kraft contract constitutes an abrogation of the contract beyond the authority of the Commission (Br. 59–61).

Appellant's operation for Kraft was not interrupted because it had never commenced. Cf. *Benjamin Franklin Line, Common Carrier Application*, 1 M. C. C. 97, 99, 100. His undertaking to haul for Kraft was, on the "grandfather" date, merely written evidence of his willingness to serve. It may have been a *bona fide* agreement to operate, but the "grandfather" clause requires proof of *bona fide* operation. The "grandfather" clause was intended to preserve to the shipping public and to the carrier the transportation service being rendered on the statutory date and to require that operations instituted after that date meet statutory tests of public necessity or public interest. 79 Cong. Rec. 5654. A contract carrier's agreement to transport, unaccompanied by

actual operation, is not a transportation service within the meaning of the "grandfather" clause, and the Commission correctly held that appellant was required to secure authority for the Kraft operation on the basis of actual proof under Section 209 (b). Cf. *Loring* v. *United States*, 32 F. Supp. 464, affirmed, 310 U. S. 609. Otherwise a carrier could by "prophetic discernment" (*Sproles* v. *Binford*, 286 U. S. 374, 391) enter into a number of contracts to be performed in the future and thus greatly extend its operations.

In *McDonald* v. *Thompson*, 305 U. S. 263, 266, this Court said, in speaking of "grandfather" rights under the Motor Carrier Act, 1935:

> The expression, "in bona fide operation," suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, *includes actual rather than potential or simulated* service, * * * [Italics supplied.]

See also *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480; *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, 83.

With respect to the Kraft contract, the lower court stated:

> Undoubtedly, the statute contemplated actual operations on the crucial date and the grandfather rights are measured by the character and extent of the service then being rendered. Actual and sub-

stantial, rather than potential service, is essential under the law. The proviso confers a special privilege and extends only to carriers plainly within its terms. The execution of the written contract with Kraft is evidence of an intention to begin service, but it was nearly eight months before operations under it were commenced and that does not meet the requirements of the statute. If there had been any intention to recognize merely the existence of a contract as a basis for a permit Congress undoubtedly would have so provided. The decision of the Commission on this question must be sustained. * * * (R. 345.)

While insisting upon present authority to continue the Kraft service as a "grandfather" right, appellant has not ignored the opportunity provided by Congress in Section 209 (b) for procuring authority for the operation as in the public interest and consistent with the policy of the Act. On January 31, 1941, he filed an application with the Commission for this purpose and was granted authority to carry on his service under the Kraft contract. *Noble Extension of Operations—Points in Illinois, Wisconsin and Minnesota*, 34 M. C. C. 671; (see Br. 63-64).

It would therefore appear that appellant's complaint that the Kraft operation should have been authorized under the "grandfather" clause

is without merit, because of the reasons advanced in the Commission's report (R. 17) and because the question is moot.

III

THE COMMISSION RIGHTLY DEFINED THE TERRITORIAL LIMITS OF APPELLANT'S OPERATION

Appellant contends (Br. 53–55) that the Commission imposed unreasonable territorial restrictions upon his operating authority. The report of the Commission describes in considerable detail the territorial operations of the appellant (R. 18–21). These findings were upheld by the court below as supported by substantial evidence (R. 345), and appellant does not allege that they lacked support in the evidence. The authority of the Commission to impose territorial limitations has been so recently sustained by this Court (*Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475; *Howard Hall Co.* v. *United States*, 315 U. S. 495) that we see no occasion for further discussion of this phase of the case.[18]

[18] Emphasis is laid (Br. 55–58) by appellant upon a "balanced operation" argument and it is claimed Noble is denied the right to "a profitable back haul." The Commission found that "Applicant's principal operations have consisted of rendering a specialized transportation service in hauling packing-house products from the Swift plant at South St. Paul for delivery to Wisconsin points, following which the truck proceeds to Chicago or Blue Island to pick up loads at the

IV

APPELLANT RECEIVED A FAIR HEARING

Appellant contends (Br. 64–69) that he was deprived of his constitutional right to a fair hearing in that he was not allowed oral argument, or to submit a written brief, on his petition for reconsideration of the order of Division 5. The court below held there had been a fair hearing (R. 345). Following the close of the testimony before the Examiner, appellant filed a written brief. Due process of law does not require argument, written or oral, on an application for rehearing. Furthermore, the petition for rehearing and reconsideration contained a full written statement of appellant's position. *Morgan* v. *United States*, 298 U. S. 468, 481.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court

---

plant of Swift or Libby, respectively, for delivery into Minnesota" (R. 17). Such being the nature and manner of his business on the statutory date, he is of course entitled to no greater authority under a "grandfather" application. If there is a public need for additional service, appellant may procure additional authority under Section 209 (b) by filing an application and proof that further operations are "consistent with the public interest." In fact, appellant has recently been granted authority to extend his operations as a contract carrier in *Noble Extension of Operations—Points in Illinois, Wisconsin, and Minnesota*, 34 M. C. C. 671, decided after the lower court's decision in this case.

should be affirmed, and the stay of the Commission's order vacated.

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MARCH, 1943.

APPENDIX

Section 1 (the declaration of policy) of the Transportation Act of 1940 (54 Stat. 898) provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(14) of the Interstate Commerce Act, Part II, provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title (49 U. S. C. 303(a)(14)).

Section 203(a)(15) provides:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation (49 U. S. C. 303(a)(15)).

Section 204 (a) provides in part:

> It shall be the duty of the Commission—
>
> * * * * *
>
> (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration (49 U. S. C. 304 (a)).

Section 209 (a) provides:

> Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph

(b) of this section and such permit shall be issue or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. * * * (49 U. S. C. 309 (a))

Section 209 (b) provides:

Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Pro-*

vided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require (49 U. S. C. 309 (b)).

Section 218 (a) provides:

It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the minimum rates or charges of such carrier actually maintained and charged for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the minimum charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this

chapter. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice, or practice affecting such charge or the value of service thereunder, except after thirty days' notice of the proposed change filed in the aforesaid form and manner; but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this paragraph with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect a less compensation for such transportation than the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed: *Provided,* That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this paragraph, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act (49 U. S. C. 318 (a)).

Section 218 (b) provides:

Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy declared in the Interstate Commerce Act, or is in contravention of any provision of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this chapter, which the Commission may find to be undue or inconsistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, and the Commission shall give due consideration to the cost of the services rendered by such carriers, and to the effect of such minimum rate or charge, or such rule, regulation, or practice, upon the movement of traffic by such carriers. All complaints shall state fully the facts complained of and the reasons for such complaint and shall be made under oath (49 U. S. C. 318 (b)).

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FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 511

BRIEF OF APPELLEES, REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, and ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE.

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Chicago, Ill.
March 29, 1943.

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INDEX.

	PAGE
Introduction	1
Statement of the Case	3
The application filed with the Commission under the grandfather clause	5
Mr. Noble's testimony before the Examiner on September 21, 1938	6
Exhibits produced before the Examiner	8
The complaint for injunction filed in the United States District Court	9
Argument:	
I. The Commission is required under Sec. 209(b) of Part II of the Interstate Commerce Act to specify in the permit the business of the contract carrier covered thereby and the scope thereof and to attach such reasonable terms and conditions as are necessary to carry out the requirements established by the Commission under Sec. 204(a) (2) and (6). This authorizes the Commission to limit the service of contract carriers to particular classes of shippers	10
II. Contract carriage is a substitute for private carriage and the inclusion of a clause limiting service to a particular class of shippers is a proper identification of the carrier service with that of the shippers whom he may serve	16
III. In granting authority to many contract carriers, the Commission has restricted service to particular classes of shippers where this was deemed necessary	25
IV. Appellant was not entitled to serve between all points and places within his claimed territory	26
V. Appellant's contention that Congress intended to grant a more liberal and elastic permit to grandfather claimants than that to be issued to new claimants is not supported by the statute	27
Conclusion	30

TABLE OF CASES.

PAGE

Cases:

Allen Bareford, 32 MMC 611 24

Wm. Bloodsworth, 32 MCC 507 24

Brashear Freight Lines, 33 MCC 279, 291 26

Cole Teaming Co., 30 MCC 539 25

Contracts of Contract Carriers, 1 MCC 628 ..... 16, 17

N. S. Craig, 28 MCC 629 ..... 20, 22, 24, 27
31 MCC 705, 707 21

De Merchants, Contract Carrier Application, 21 MCC 585 24

Doyle Transfer Co., 32 MCC 234 24

Faye and Matthews, 32 MCC 553 24

In the Matter of Filing of Contracts by Contract Carriers, 20 MCC 8 18

Fordham Bus Corp. v. U. S., 38 F. Supp. 739 18

Freight Transportation, Inc., 32 MCC 742 24

George Truck, 27 MCC 283 24

Harvey Jones, 33 MCC 319 24

Jones Extension of Operations, 21 MCC 470 25

Kavanagh, Contract Carrier Application, 33 MCC 581, 583 26

Keystone Transportation Company, Contract Carrier Application:
19 MCC 476 11
19 MCC 491 14
19 MCC 475 ..... 25, 26

Knight, Contract Carrier Application, 30 MCC 500 25

Lockland Film Service, 33 MCC 588 24

McCarthy, Contract Carrier Application, 33 MCC 105 24

PAGE

Montegna & Company, 32 MCC 691 24

National Moving and Warehouse Corporation v. United States, 3 Fed. Car. Cas. 80073, F. Supp., U. S. D. C., S. D., N. Y. 27

Needham's Motor Service, 32 MCC 492 24

Ohley & McKell, 29 MCC 205, 207 26

Pranger, Contract Carrier Application, 29 MCC 153 26

Merrill M. Pregler, 18 MCC 257 ..... 20, 23

J. Siegel Trucking Corp., 32 MCC 245 24

Standard Transport Lines, 32 MCC 13 24

Stepanek, Contract Carrier, 21 MCC 612 26

Stephenson v. Binford, 287 U. S. 251 18

Stormes, J. B., Extension, 21 MCC 604 26

U. S. v. Carolina Freight Carriers Corp., 315 U. S. 475. 27

H. J. Williams, 31 MCC 13 24

Statutes:

Interstate Commerce Act:

Sec. 203(b) 22

Sec. 204(a) (6) and (2) 11, 16

Sec. 209(b) of Part II 3, 11

Urgent Deficiencies Act of October 22, 1913, Sec. 45a, Title 28, U. S. C. A. 38 Stat. 220 1

IN THE

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JOHN F. NOBLE, doing business as NOBLE TRANSIT COMPANY, Appellant, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellees.	No. 511

BRIEF OF APPELLEES, REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, and ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE.

The Regular Common Carrier Conference of the American Trucking Associations and the Illinois-Minnesota Motor Carriers' Conference are appellees in this case by reason of their participation in the proceedings in the District Court of the United States which permitted their intervention pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913, Sec. 45a, Title 28, U. S. C. A., 38 Stat. 220.

The Illinois-Minnesota Motor Carriers' Conference, being representative of common motor carriers, operating between Chicago and Minneapolis-St. Paul, was a protestant in the proceedings involving appellant's grand-

father application before the Interstate Commerce Commission.

The position of the appellee Conferences is as follows:

(1) That the Commission has properly interpreted the Interstate Commerce Act, and has, accordingly, restricted appellant to the rendition of transportation service as a contract carrier under individual contracts with persons who operate food canneries or meat-packing businesses.

(2) That the Commission has properly decided the application both as regard the commodities to be hauled and the territory and points to be served.

We, therefore, believe that the action of the District Court should be affirmed, as it had sustained the Commission.

STATEMENT OF THE CASE.

For a better understanding of the operations of the appellant, it is necessary to supplement the statement of the case appearing in appellant's brief. When those operations, as they were conducted on July 1, 1935, are understood, it will be apparent that the Commission has in no way deprived appellant of his grandfather rights, but has been liberal in its grant of commodity and territorial authority; while at the same time, it has appropriately described the scope of his business as the Act intends. Only an examination of those facts make clear the reasonableness of the so-called restriction in appellant's authority, the accuracy of the limitation that appellant shall serve only food canneries and packing houses, the need for such description of the class of shippers which he may serve and the manifest intent of Congress that the Commission should insert such description in permits when found necessary.

Appellant's operations were revealed to the Commission in (1) his application, (2) his testimony before the Examiner and (3) his exhibits introduced at such hearing. His complaint for an injunction filed in the District Court contains certain pertinent matter. The Commission's decision analyzes the evidence and justifies the *description* of the operation which appellant chooses to call a *restriction*. Direction of attention to certain parts of the Commission's decision is essential to an appreciation of the need for the establishment of the classes of shippers whom appellant may serve and was necessary to fulfill the obligation placed upon the Commission by Sec. 209(b) of the Act, in the following provision:

> "* * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it at the

time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier; the requirements established by the Commission under Sec. 204(a) (2) and (6). * * *"

The question before this court is whether the following finding is in accord with the evidence and contains the basis for the specification of appellant's business in the permit to be issued:

"Findings: We find that on July 1, 1935, and continuously since, appellant has been in bona fide operation as a contract carrier * * * under individual contracts with persons * * * who operate food canneries or meat-packing houses, (a) of canned foods from Blue Island, Illinois, to St. Paul * * * and (b) of fresh meats, canned foods, dairy products, and packing house products and supplies, from South St. Paul to Grand Forks, North Dakota, Chicago and Rockford, Illinois, and points in that portion of Wisconsin * * * and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minnesota, and La Crosse, Wisconsin, over irregular routes; that applicant is entitled to a permit authorizing the continuance of such operations. * * *"

The appellant fails to point out any particular in which this grant of authority deprives him from continuing to do what he was doing on July 1, 1935. That is one very certain test for determining whether his application has been dealt with justly by the Commission. The appellee, Illinois-Minnesota Motor Carriers' Conference, has not opposed this grant of authority.

THE APPLICATION FILED WITH THE COMMISSION UNDER THE GRANDFATHER CLAUSE.

This application which is part of the certified record contains the following pertinent matter:

(1) Appellant gave his business address as South St. Paul.

(2) He asked for a permit as a contract carrier.

(3) He stated he did not haul for the general public.

(4) He hauled under special, written contracts for Swift and Company, Libby, McNeill and Libby, Plankington Packing Company and others.

(5) The commodities transported were: Commodities generally, meat and packing house products especially.

(6) On July 1, 1935, he had four tractors and four semi-trailers.

(7) In describing his business, he said:

> "Applicant is principally engaged in the business of delivering meats and packing-house products for Swift & Company, South St. Paul, Minnesota to various municipalities, towns and cities within the states of Minnesota, Wisconsin, Illinois, Iowa and North Dakota, and is engaged under contract with various concerns in the movement of freight from Chicago and Milwaukee and adjacent towns to St. Paul, South St. Paul, Minneapolis, and various points in Minnesota."

Had appellant been granted authority on the basis of his application without a hearing, who could question the propriety of the Commission's granting him a permit as a contract carrier to transport meats and packing house products for packing houses and for food canneries (such as Libby, McNeill and Libby) from South St. Paul to the

area of distribution of the packing house products and from Chicago to the Twin Cities area? He revealed a devotion to particular classes of shippers and it must be admitted that he made his application as broad as he could, consistent with the fact that it was under oath.

What the Commission granted him is as broad as his application except that he was not given all of the territory applied for, because he had not served much of it.

MR. NOBLE'S TESTIMONY BEFORE THE EXAMINER ON SEPTEMBER 21, 1938.

Mr. Noble testified (R. 38) that he began his operation as a contract carrier working for Swift & Co., which is a packer. He contracted with Swift to place trucks at its disposal for use out of its South St. Paul packing plant. The agreement included the movement of commodities out of Chicago exclusively for Swift and its subsidiaries. Swift at South St. Paul would furnish a load in one direction, usually tying it up with a return load coming from some point fairly adjacent to the point to which Noble was sent. Swift operates a packing plant at South St. Paul (R. 39).

The operation, beginning in November, 1934, and continuing to July 7, 1935, was from South St. Paul, Minneapolis and St. Paul for Swift & Co. to various points in Wisconsin, Iowa, Illinois, and North Dakota, and from various places in Illinois, Iowa and Wisconsin to various places in Minnesota, and from Iowa to places in Illinois (R. 48).

The commodities hauled were fresh meat, packing house products, canned goods, butter, poultry, eggs and supplies of all kinds, such as machinery, chemicals and articles too numerous to mention, sometimes referred to as branch house supplies (R. 48).

In February, 1935, Swift & Co., called Noble with a view to his making store-door deliveries to various places in Wisconsin (R. 49). Prior to this he had hauled from the Swift plant at South St. Paul to a break bulk point in Wisconsin or northern Illinois with other carriers providing the service from the break bulk point to the consignee's door (R. 50, 53). Thereafter, he was to supply the complete service from the plant to the store-door.

In the case of Noble's peddler trucks, the final destination was oftentimes Milwaukee, Chicago, Fond du Lac or some other point at which Swift, quite frequently, *would have a return load to take back* (R. 53). It was Swift's policy to give Noble a return load of some of its commodities out of Chicago to some destination on the way back to St. Paul. That was done and is being done (R. 54). The schedule might be to go to either Chicago or Milwaukee for a return load or it might be to go to Marshfield for a return load of cheese. Only in rare instances did the truck deadhead empty to St. Paul. It might deadhead to Chicago for the return load (R. 54).

Noble also entered into a contract with Libby, McNeill and Libby in February, 1935, for the transportation of canned goods, including preserves, meat, milk and other edibles. These shipments were arranged for Libby through Swift & Co. and moved from Libby's plant at Blue Island, Illinois, adjacent to Chicago, to Wisconsin or Minnesota points (R. 55).

Exhibits 3, 4, 5, 6, 7 and 8 were introduced (R. 60) listing the shipments handled to a major break-bulk point such as Wisconsin Rapids, Beaver Dam and Burlington (R. 61). The truck destined to Eau Claire would peddle to points in its vicinity (R. 66).

EXHIBITS PRODUCED BEFORE THE EXAMINER

Exhibit 5 was admitted in evidence (R. 60) and is typical of the lists of shipments introduced by Noble to prove actual operations. It indicates the dates, points between which the shipments moved, and the commodities transported. This exhibit is referred to because it covers the critical period from November 17, 1934, to July 1, 1935, the grandfather date.

This method of proving actual operations was that employed in the conduct of all grandfather cases. The statute gave rights on the basis of actual operations and not on the basis of the claims made in the applications only.

The significance of Exhibit 5, covering the crucial period as it does, is as follows:

(1) It shows that only Swift & Co., or Libby, McNeill and Libby were served.

(2) The point of origin was invariably South St. Paul or Chicago, with a few shipments from Milwaukee, Blue Island, Rockford, Beaver Dam and Sioux City.

(3) The destination points from the South St. Paul plant were such points as Janesville, Beaver Dam, Burlington, Wausau, Kenosha and other points, all of which are within the destination territory granted by the Commission.

(4) The destination points on the shipments from Chicago were either granted by the Commission, or the testimony indicated that they had been hauled only sporadically or had been transferred to another carrier at Minneapolis for delivery to the destination shown in the exhibit.

Again appellees make the point that appellant has not shown that the Commission has denied him the right to continue to do what he was doing on July 1, 1935. In fact,

the Commission has treated him with liberality in outlining the Wisconsin territory, some of the points not having been served for the first time until 1937 (R. 216, 224).

Exhibit 6 covers the period from July 1, 1935, to October 15, 1935, and in each instance the shipper is Swift & Co.

As an illustration of the commodities transported, a shipment handled for Swift on February 15, 1935, from Chicago to Winona consisted of empty containers, bags of asphalt, rope, ammonia, paint, tires, liquid glue, sheep casings, cartons, bars of pig lead, overalls, etc. (R. 163).

A contract was entered into with the Kraft Phenix Corporation on July 1, 1935, but hauling under it did not commence until March, 1936 (R. 190).

In the exhibits listing the shipments transported by Noble, Derby Foods, Inc., G. H. Hammond Co., Omaha Packing Co., Container Corporation, Rockford Fiber Corporation appears as consignor or consignee, but these shipments were all under the contract between Noble and Swift (R. 192, 193, 198).

Mr. Noble did not commence to serve Eau Claire, Wisconsin, a break bulk point, and towns in its circuity, for Swift until 1937 (R216-224), and this business he took away from Glendenning Transfer Service, (R. 224) a common carrier, which had served the points from 1932 (R. 317).

THE COMPLAINT FOR INJUNCTION FILED IN THE UNITED STATES DISTRICT COURT.

The proceeding was instituted November 8, 1941, and in his complaint appellant admits the following:

(1) That he has entered into 120 contracts, of which 83 are in existence (R. 11).

(2) They relate to the transportation of the same or related articles, such as were handled for Swift, Libby or Kraft.

(3) That he now has 22 tractors, 22 trailers and 7 straight trucks.

Reference is made to these facts because they may bring more meaning to the decisions of the Commission hereinafter referred to, dealing with the need for protecting common carriers by defining the type of service which contract carriers are intended to render.

The growth of applicant occurs during a time when his application is pending and he is under no restraint as to the class of shippers whom he may serve. Without the guidance and limitation of a restrictive clause such as the Commission would embody in his permit, he has added contracts promiscuously and is undoubtedly performing a common carrier operation under the guise of contract carriage.

Applicant's growth is out of all proportion to the growth in traffic in the period in question. It follows that he has taken business from common carriers and his case portrays the evils that will eventually result if the Commission does not limit the authority of the contract carrier in the pattern here adopted. In some of the cases hereinafter referred to, the Commission has found that contract carriers have attracted business from common carriers by reason of lower rates. Contract carrier rate cutting assumed alarming proportions and compelled the adoption of certain requirements designed to putting a stop to such practices.

ARGUMENT.

I.

The Commission is required under Sec. 209(b) of Part II of the Interstate Commerce Act to specify in the permit the business of the contract carrier covered thereby and the scope thereof and to attach such reasonable terms and conditions as are necessary to carry out the requirements established by the Commission under Sec. 204(a) (2) and (6). This authorizes the Commission to limit the service of contract carriers to particular classes of shippers.

This is in answer to Point II of appellant's brief.

In the case at bar, the Commission stated (R. 22) that applicant's service was not similar to that of a common carrier but rather that of a carrier of canned goods, packing house and related products in the manner above described. Hence, the form of authority to be issued to Noble was decided on the basis of the Commission's decision in *Keystone Transportation Company* contract carrier application, 19 MCC 476.

The *Keystone* case was decided October 19, 1939, and was selected by the Commission as a test case for the purpose of determining both its power and its duty with respect to the statutory requirement that it define the scope of the permit of a contract carrier. Reference to the decision will indicate the great number of counsel who appeared at the invitation of the Commission to aid in the determination of the problem. By that time, the Act had been in force for five years. Certain corrective measures had been taken by the Commission from time to time to keep in proper balance the spheres of common and contract carriers. In the decision of the *Keystone* and companion cases, the Commission had the benefit of the experience and

ability of counsel representing shippers, shipper associations, state public utility commissions, railroads and common and contract motor carriers.

Chairman Eastman's concurring opinion (R. 496) opens with a review of the conditions prompting the enactment of Federal legislation to regulate the motor carrier industry. He recalled that common carriers are a public institution subject to severe legal obligations which include their responsibility to serve all who seek their services, with equality and fairness. They may not pick and choose their shippers. Regulatory power in the new Act as well as in the original Interstate Commerce Act was designed to enforce these basic obligations comprehensively and strictly. It is upon common carriers that the general public must depend for adequate and efficient transportation and, accordingly, their proper protection against conditions which will undermine and sap their ability to perform such transportation is of the very essence of regulation. Contract carriers, on the other hand, are not engaged in a public business and are not the transportation servants of the general public. They may pick and choose their customers. Prior to the Act, Mr. Eastman states, the transportation industry was in an unsound economic condition, competition was running wild, unjust discriminations abounded, facilities were being multiplied without plan and in disregard of public need, and both carriers and shippers were suffering. Confronted with such conditions, and recognizing certain inherent advantages in the motor carrier industry in peace and in war, Congress enacted the Motor Carrier Act in which it made clear its declaration of policy that it would regulate transportation in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation; promote adequate, economical and efficient service by

motor carriers and reasonable charges, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices.

Further characteristics of the contract carrier, operating within its legitimate sphere, were drawn by Mr. Eastman. Its function is to furnish a specialized and individual service which is required by the peculiar needs of a particular shipper, and which a common carrier cannot well undertake. If contract carriers are confined to this function, they cannot endanger the performance by common carriers of their public function. If not so confined, contract carriers will inevitably poach upon the most profitable business of the common carriers, taking the cream of the business and leaving the skim-milk to the common carriers to the disadvantage of both themselves and the general public.

The Commission reaches the conclusion that contract carriers serving shippers who handle a wide range of commodities, such as chain stores, a permit which would permit the hauling of such commodities as are dealt in by chain stores would prove inadequate as the carrier would add contracts with any class of shipper whose commodities fell within the wide group handled by chain stores. The only effective way of keeping such a contract carrier within due bounds was to limit the class of shippers which he might serve.

It may be recognized that since the inception of the Act; and during the period when grandfather applications are being determined, it has been difficult in some instances, for a carrier to determine whether new operations fall within the scope of his operations as of the grandfather date. If the new operation is within such bounds, his competitors have recognized this. To the common carriers it seems that in most instances such extensions of contract

carriers fell outside the scope of operations conducted on the grandfather date, and, accordingly, the new contract should not have been entered into and service inaugurated without the filing of an application under Sec. 209 and proof that the new operation was consistent with the public interest. Rarely did the contract carrier resort to the Commission. Like appellant, who has skyrocketed the number of his contracts from the couple existing on the grandfather date to 120 at this time, most contract carriers resolved any question as to their right to add a particular contract in their own favor. Their answer is the same as that of appellant. As he had hauled everything from abrasives to zinc, as a packing house supply, he felt he could perform transportation service for any type of shipper of any commodity found in the extensive list denominated "packing house products and supplies", so long as the service was performed within the territory claimed in the application. The Commission would not stop such addition until it had determined the grandfather application. In the meantime, common carriers found their most lucrative business taken from them by contract carriers. The situation illustrates very clearly what would happen if, on final determination of the contract carrier applications, the Commission cannot, or will not, define the scope of the contract carriers in terms of the class of shippers which they have served. It was this situation which the Commission had in mind in stating in the *Keystone* case (19 MCC 491):

> "The argument herein presents a vivid picture of the struggle for competitive advantage, and possibly in some instances, even survival, between motor contract carriers and common carriers. The common carrier is required to serve the general public within the limits of its facilities, at its published rates, without discrimination. • • • Obviously, the contract carrier then, in competing for certain classes of traffic

with the common carrier, has a substantial advantage. It may secure by contract a continuous flow of traffic and thereby acquire a stability of operation not possible for a carrier serving the general public; and the shipper served or to be served, justified his need for contract carrier service on the grounds of its special character and its adaptability to the demands of his business.

This competitive situation has existed in the motor carrier industry for some time and was within the knowledge of the Congress when the motor carrier law was enacted. Control of this situation was clearly contemplated."

Against this background, the Commission proceeded to consider the meaning of the statute enjoining upon it the duty of specifying in the permit "the business of the contract carrier covered thereby and the scope thereof," and it interprets this language as follows (P. 493):

"The phrase * * * plainly means more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes, in addition to the business of being a contract carrier, the exact and precise character of the service to be rendered by such carrier. When so considered, it is clear that we have the power to incorporate in a permit the territory and points to be served, the commodities to be transported, the equipment to be used, and any other specification necessary to describe the service authorized, even to the extent of limiting the service to be rendered to that of a particular type, such as that rendered a retail food store. * * * That a specific classification of the business of a contract carrier was intended is indicated clearly by Sec. 204(e), wherein we are authorized to establish reasonable classifications of common and contract carriers by motor vehicle as the special nature of the services performed by such carriers shall require, and such reasonable rules, regulations and requirements to be observed by such car-

riers as we may deem necessary or desirable in the public interest.

"Next we are given power to attach to a permit, at the time of issuance and thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as are necessary to carry out, with respect to the operations of the carrier, the requirements established by us under Sec. 204 (a) (2) and (6). Examples of such requirements are those established in *Contracts of Contract Carriers, supra*, with respect to the terms of contracts under which a contract carrier may operate. Permits granted by us are made subject to those requirements."

Certainly the meaning of the words "the business of the contract carrier" and "the scope thereof" are better judged by the circumstances giving rise to their use. It cannot be fairly contended that the Commission has misconstrued the meaning of these phrases. Their administrative responsibility would be seriously impaired if they were required to ignore the conditions which they have found to exist in the performance of their duties, and, based thereon, to adopt the corrective which they feel to be necessary.

II.

Contract carriage is a substitute for private carriage and the inclusion of a clause limiting service to a particular class of shippers is a proper identification of the carrier service with that of the shippers whom he may serve.

Applicant has chosen to be a contract carrier. He has performed service under special contracts. He has not held himself out to serve the public. He has performed a specialized service integrated to the needs of the shippers served on the grandfather date and has substituted his service for that which they might have performed on their own behalf in their own equipment. The

restrictive clause serves to protect common carriers from the performance of service by a contract carrier outside his legitimate scope.

In *Contracts of Contract Carriers*, 1 MCC 628, the Commission held that contract carriage is a form of private carriage; that state and federal regulation of contract carriers was designed to protect and foster an adequate, common carrier, transportation system providing a nondiscriminatory service at uniform rates; and that the patent object of Congress is to protect common carriers against cut-throat competition. The Commission pointed out the advantage which contract carriers have over common carriers in their ability to render a discriminatory service, thereby attracting shippers who have a steady volume of traffic. This tendency to entice away the most lucrative traffic has become a positive peril to common carriers (P. 631). In order, therefore, to avoid the promiscuous addition of contracts, the Commission established a requirement (P. 632) that contract carriers shall transport under written agreements which shall provide transportation for particular shippers and which shall be bilateral in form and impose specific obligations upon both the carrier and shippers. By the last was meant a guarantee of tonnage which the shipper would turn over and the carrier would accept. The proposed service was required to be with respect to a series of shipments, which at once negatived any general holding out by the contract carrier and indicated a dependence on the carrier as though the service was that of private carriage.

When the implication of these requirements is discerned, it is seen that the contract carrier is so closely identified with the shippers whom he is serving as to disqualify himself from competing with common carriers in most cases.

This expedient was found necessary by the Commission to protect common carriers from the loss of their choicest traffic to contract carriers. If the shipper, planning his traffic needs with respect to a series of shipments, will contract accordingly, and if the service is special in nature, fitted to the shipper's requirements, there is no right on the Commission's part to deprive him of contract carrier service. Any less need than this implies that the shipper will have to depend on common carrier service. The coupling of the service which the contract carrier is qualified to perform with the type of shipper whom he is to serve, works no hardship on the former or either.

That the Commission has properly evaluated the Congressional intent to protect common carriers is evidenced by *Stephenson* v. *Binford*, 287 U. S. 251, 273, 274. See also *Fordham Bus Corp.* v. *U. S.*, 38 F. Supp. 739.

Another decision of the Commission revealing the competitive disadvantage of the common carriers unless they are given the protection intended by the Act is *In the Matter of Filing of Contracts by Contract Carriers*, 20 MCC 8. The Commission states as follows (P. 10):

> "It is generally conceded that many self-styled contract carriers are not in fact contract carriers and are offering nothing in the way of specialized services usually typical of such operations, but rather, pending a final determination of their status, are extensively engaging in operations directly competitive with established common carriers, applying rates known only to themselves and their shippers, and otherwise engaging in practices forbidden to common carriers."

The disclosure of this condition indicates the need for the relief proposed in the *Keystone* case. It is insufficient that a carrier simply denominates himself a contract carrier. The identification of his service with certain classes of

shippers protects those with whom he has contracts and is some assurance to them that he will provide service when called upon to do so. The Commission is well aware that contract carriers whose rights are not determined piled contract on contract with the result that the shippers must still rely on the common carrier.

We wonder whether the Commission knows what the appellant wants which he does not have in order to continue to serve the packing houses and canneries served on the grandfather date. He has not pointed out any service within the scope of his operations which he was performing on July 1, 1935, which he cannot provide under the proposed order. We know what he wants and that is absolute freedom of choice in selecting shippers with the most attractive traffic and inducing them to turn to him on the basis of lower rates which, in some instances, he may be able to give because he does not have to provide service to all, regardless of the value of the traffic. At first blush it might seem that if the contract carrier can render service cheaper, he has justified himself. The fact is that few shippers have their transportation needs satisfied by contract carriers. They will turn to common carriers for the handling of their less than truck load traffic even though it may be the part most expensive to handle. They have thus failed to pay their fare share along with other shippers of the cost of providing the ever present common carrier service.

One might be tempted to believe that we over-emphasize the necessity of the restriction which the Commission formulated in the *Keystone* case; but an examination of the legislation of the various states regulating intrastate traffic reveals a uniform need to protect the common carriers and the adoption of various kinds of expedients to accomplish it, such as an arbitrary provision that a prescribed

number of contracts automatically converts the carrier into a common carrier.

Where an extension of authority is sought to permit a new operation by a contract carrier, the Commission is in a position to test the propriety of the proposal and to afford protection to the common carrier. The restrictive clause is designed to insure a similar measure of protection when the carrier merely adds the contract without resorting to the Commission. The identification of the carrier's authority with a given class of shippers tends to guide any extension of the proposed service to instances where a special and individual service is required by the needs of a particular shipper. In *Merrill M. Pregler*, 18 MCC 257, the Commission said:

> "The difference between common and contract carriage is inherent in the service rendered and accounts for the difference in regulations as provided in the Act, including, except in the case of a grandfather application, a showing of public convenience and necessity in the case of certificate applications, and of consistency with the public interest and policy declared in Sec. 202(a) of the Act in the case of permit applications.' The foregoing is entirely in keeping not only with the provisions of Sec. 203(b) (15) and (16), but all other provisions of the Act which leave no room for those who would render a common carrier service under the guise of contract carriage. Otherwise, there can be no effective control of the transportation facilities of the nation to the end that an adequate and nondiscriminatory system can be maintained, and there can be no effective regulation of rates and charges. We are of the opinion that the proposed operations are those of a common carrier by motor vehicle."

In *N. S. Craig*, 28 MCC 629, the Commission considered the change in the statutory definition of a contract carrier as it appears in the 1935 Act and 1940 Transportation Act,

and answers the argument advanced by appellant (Brief, p. 18). The decision points out that the making of a large number of contracts strongly suggests a holding out and the conversion of the carrier to common carriage. Had appellant been adding contracts in obedience to the restrictive clause proposed by the Commission, he could not have added over one hundred contracts to jeopardize his status as a contract carrier.

The *N. S. Craig* application (31 MCC 705) came before the entire Commission on reconsideration, which found that the change in the definition of "common carriers" under the 1935 and 1940 Acts indicated a purpose to make the terminology conform with the usual common law definitions (707) which would mean that more and more carriers, self-denominated as contract carriers, would be recognized as common carriers where no particular classification of shippers had been served, no specialized service performed but actions of the carrier tended to indicate a general holding out. The case is further helpful for the discussion of the distinction between common and private (contract) carriers at common law. We believe this court will recognize that the Commission's discussion of the distinction correctly states the judicial distinction made in the two types of carriers over long periods of time. Private carriage generally meant not only the provision of self service, but also service under contract for another. The operation had a much closer relationship between the contract carrier and his shipper than that between a common carrier and his shipper. Some decisions indicated that the private carrier was liable only as a bailee, but in the interests of protecting the shipper who was parted from his goods by possession and distance, the courts, from the outset, brought into the common carrier status and fixed upon them liability as insurers all who were not significantly wedded to the shippers whom they served. In case of doubt, the carrier was found to be a common carrier.

Reverting to the *Craig* case, *supra*, the Commission held the final test of the distinction between the two types of carriers was the existence or non-existence of a holding out. Lack of specialization in service was an indication that the carrier was not devoting his facilities to meet the peculiar needs of the shipper, and hence, indicated a willingness and readiness to serve anyone whose business was thought profitable.

The decision then contains these significant observations:

> "The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, or the supplying of related non-transportation services such as the assembling, placing, or servicing of machinery. Or it may consist of nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited number of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization.
>
> We recognize, of course, that even specialization in physical operations does not necessarily negative a common-carriage status where, for example, such physically specialized services are affirmatively held out to all shippers in that particular class of the public having need therefor. But, on the other hand, we are convinced that the lack of one or the other forms of specialization above indicated conclusively negatives contract carriage as contemplated by section 203(b) (15) of the act. This conclusion is very strongly fortified by the fact that when the proposal to amend the statutory definitions of common and contract carriers by motor vehicles by Senate Bill 2009, mentioned above, was before the Congress, one of the

Senate conferees, in presenting to that body the report of the conference committee, used the very language of our then recent report in the *Pregler* case and explained as follows:

> *'It is intended that all over-the-road truckers shall, whenever possible, fall within the description of common carriers.*
>
> 'It is intended by the definition of contract carriers to *limit* that group of those who operate under individual contracts *and* who render a *specialized service* which is required by the *peculiar* needs of a *particular* shipper and *who do not come within the definition of common carriers.*' (Emphasis supplied.)

Adoption of the amended definitions following the explanation constitutes indisputable legislative approval of our prior administrative interpretation of the statutory definitions and, coupled with the declaration above quoted that the sole purpose of the amendment related to another matter, practically forecloses us from any conclusion other than that heretofore reached."

Chairman Eastman's concurring opinion (P. 713) evidences the accuracy of the analysis by the administrative body of the situation existing between common and contract carriers. It indicates the disposition of the Commission not to take precipitate steps even when a problem has arisen and an administrative solution could be invoked. If anything, the Commission's solicitude for contract carriers has deprived common carriers of remedies which have at all times been recognized as existing and helpful. This has resulted in business being taken from common carriers. The contract carriers have no valid ground for contending that the Commission has too eagerly applied measures to protect the non-discriminatory service of common carriers.

The propriety of the Commission's description of appellant as a contract carrier engaged in transporting packing house products and supplies, and canned goods for packing houses, and canneries, is clearer in the light of the *Craig* case, *supra*.

The distinction of specialization of service between common and contract carriers as delineated in the *Pregler* and *Craig* cases, *supra*, has been approved by the courts. *Doyle Transp. Co. v. U. S.*, 45 F. Supp. 691.

With no restrictive clause to guide either the alleged contract carrier or the shipper who uses him, many cases have been brought to the Commission's attention where the carrier, self-denominated as a contract carrier, was, in fact, a common carrier. A few of these cases are:

E. W. McCarthy, Contract Carrier Application, 33 MCC 105.
Montegna & Company, 32 MCC 691.
Freight Transportation, Inc., 32 MCC 742.
Doyle Transfer Co., 32 MCC 234.
Standard Transport Lines, 32 MCC 13.
H. J. Williams, 31 MCC 13.
J. Siegel Trucking Corp., 32 MCC 245.
Wm. Bloodsworth, 32 MCC 507.
Needham's Motor Service, 32 MCC 492.
George Truck, 27 MCC 283.
Lockland Film Service, 33 MCC 588.
Allen Bareford, 32 MCC 611.
Faye and Matthews, 32 MCC 553.
Harvey Jones, 33 MCC 319.

We submit that the shipper, truly in need of a specialized service and a comparable substitute for self service, has an interest in seeing that his contract carrier not only remains such but continues ready to perform that service for him. Does not a suspicion arise in the case of this

appellant that he is no longer performing as a contract carrier? Where is there any substitution for private carriage when about twenty vehicles are serving about one hundred shippers? These new shippers served by appellant, it may be fairly assumed, were taken from common carriers. In the absence of a specialized service which, we submit, appellant does not have the facilities to render, the inducing cause in most instances was a reduction in rates below that of the common carriers.

III.

In granting authority to many contract carriers, the Commission has restricted service to particular classes of shippers where this was deemed necessary.

In *Cole Teaming Co.*, 30 MCC 539, the Commission said (P. 542):

> "In *Keystone Transportation Co.*, 19 MCC 475, the Commission, Division 5, found that the Act empowers us to limit the service under a permit to a class or classes of shippers. It was there concluded that in cases where a contract carrier transports commodities of such scope as to constitute practically general commodities, any authority granted should be limited to the particular class or classes of shippers served. Because of the wide range of commodities transported by applicant for First National Stores, there is here presented a situation similar to that present in the *Keystone* case, and for the reasons given therein, we conclude that any contract carrier authority granted herein should be similarly limited."

In the following cases, the Commission applied the *Keystone* principle:

Knight, Contract Carrier Application, 30 MCC 500.

Jones Extension of Operations, 21 MCC 470.

De Merchants, Contract Carrier Application, 21 MCC 585.

J. B. Stormes, Extension, 21 MCC 604.

Brashear Freight Lines, 33 MCC 279, 291.

Kavanagh, Contract Carrier Application, 33 MCC 581, 583.

Lee Wilson, Contract Carrier Application, 29 MCC 525, 531.

Ohley & McKell, 29 MCC 205, 207.

Pranger, Contract Carrier Application, 29 MCC 153.

In applying the *Keystone* principle in the application of *Stepanek, Contract Carrier*, 21 MCC 612, the Commission said:

> "In order to protect the interests of motor common carriers operating in the same territory which serve the public generally, and *in order to prevent the evolution of the proposed specialized operation into one of a general character, the authority herein granted will be limited so as to authorize service for a class of shippers in the transportation of such commodities as are dealt in by them. Compare Keystone Transportation Co.*, 19 MCC 475." (Italics supplied.)

IV.

Appellant was not entitled to serve between all points and places within his claimed territory.

The evidence indicates what appellant was doing. His base of operations was the Twin Cities area. He was performing a distribution operation as the most important aspect of his service. He has not shown wherein the present description of his territory has deprived him of performing any service for which he had grandfather rights. That is the test. He has been liberally treated. He shows no legitimate right to perform services between all points within the territory.

Appellant refers to the case of *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, as authority for his claim to service between all points in the territory. The distinction which he overlooks is the fact that Carolina Freight Carriers is a common carrier presumed to be ready to handle traffic from any point which he serves. Appellant, as a contract carrier, picks and chooses his customers. It cannot be assumed that he will serve either any shipper or point until he is actually under contract. As was said in the *N. S. Craig* case, 28 MCC 629:

> "One who proposes or offers a specialized service fitting the needs of a particular shipper or shippers has nothing to hold out to the public generally."

In *National Moving and Warehouse Corporation* v. *United States*, 3 Fed. Car. Cas. 80073, ... F. Supp. ..., U. S. D. C., S. D., N. Y., ... Fed. ..., decided December 2, 1942, the court sustained the Commission's refusal to give a non-radial service when it was principally a radial service which had been performed.

We submit that appellant has not been unduly limited in rendering service to the classes of shippers whom he was serving on the grandfather date. Moreover, if an extension is needed, he can get that authority under the statute if the granting of it is consistent with the public interest.

V.

Appellant's contention that Congress intended to Grant a more liberal and elastic permit to grandfather claimants than that to be issued to new claimants is not supported by the statute.

This contention is made as the first point of appellant's brief (P. 16). We believe it is patently false, but a failure to deny it might be implied as an admission on our part.

If the transportation system is to be guided in its growth to achieve the objects set forth in the Congressional policy, it cannot have a privileged class of contract carriers whose permits embrace everything. Regulation would be impossible.

The opening clause of Sec. 209(a) that no person shall engage in business as a contract carrier without a permit is a clear and unambiguous intent to embrace all contract carriers and to differentiate as to none. The differentiation came with respect to the proof required to establish a right to a permit. It assumed in the case of grandfather claimants that as they were in operation they had a legitimate function and place in the transportation field without proof of consistency with the public interest.

While it is not contended by the appellee Conferences that no new contracts could be entered into pending determination of the carrier's application, there is no express authority in the statute authorizing it and the Commission has only followed a policy that new contracts be within the scope of applicant carrier's operations as of the grandfather date. Obviously, if the Act was to bring order out of the chaotic condition it was aimed at relieving, a distinctly new operation had to be eyed both with respect to the rights of the common and contract carriers in the field, and the particular carrier who might be losing the business to the applicant. No better way of frustrating the purposes of the Act could be imagined than that which would give grandfather claimants, common or contract carrier, a preferred status as to what new operations might be instituted.

We witness here a tremendous growth in appellant's business. The operations on the grandfather date presumably were deemed financially sound by the parties. Swift needed appellant, presumably as a distribution carrier

and was aware that trucks could not be economically deadheaded from the final distribution point to the Twin Cities, so his loads were made to end on their outbound journey at Milwaukee or Chicago where Swift had need for service back to the Twin Cities. The right to perform this service has been preserved to appellant on the Commission's proposed authority. How can it fairly be contended that he may create new origin points within the territory without disturbing the carriers already serving these points? It must be remembered that regulation does give a preferred status to the common and contract carriers in the field, and a short-sighted favoritism to a new applicant who may be taking business away from existing carriers, simply creates a new problem. It is just as much in furtherance of a sound economical transportation system to protect certificated and permitted carriers as it is to allow a new one in the field or to grant new authority to a presently authorized carrier. Protection of those in the field is the very essence of the Act and of the theory of regulation. Manifestly, Congress did not intend to freeze all authority as of the grandfather date. It proceeded on the assumption that a substantial service was already being afforded.

Appellant has shown no deficiency in the proposed authority which fails to give him the right to perform any backhaul within the scope of his operations on the grandfather date. He does not show any desired backhaul which he cannot now perform. If there are some, why should he not apply for them under the procedure which Congress has outlined and give the competing carriers an opportunity to have their say and the Commission an opportunity to weigh the proposal in the light of all considerations?

This leads to the answer to the contention in appellant's sixth point (P. 58) that the appellant should have been au-

thorized under his grandfather application to haul for the Kraft-Phenix Cheese Co. The Commission in several cases has already been sustained in its construction that the statute intended to grant authority for actual, rather than for simply planned operations. This contention of appellant lacks all realism. If mere proposed operations afforded the basis of grants of grandfather authority, the sections of the statute dealing with new applications would have been surplusage. Invariably his zeal causes him to forget the existing carriers serving Kraft and Congress intended that such zeal was to be tempered in the interest of all parties.

Conclusion.

The District Court confirmed the decision of the Commission and dismissed the complaint. The Commission has been liberal in its treatment of the application in question. If appellant's operation was workable on the grandfather date, it is certainly workable under the Commission's order and he has classes of substantial shippers to serve in a manner conforming to his own choice of operations. The District Court's decision should be affirmed.

Respectfully submitted,

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Dated this 29th day of March, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 511.—October Term, 1942.

John W. Noble, Doing Business as Noble Transit Company, Appellant, *vs.* The United States of America, Interstate Commerce Commission, et al. } Appeal from the District Court of the United States for the District of Minnesota.

[May 3, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal[1] from the judgment of a three-judge court (45 F. Supp. 793) which dismissed a complaint filed by appellant to review and annul certain restrictive provisions of an order of the Interstate Commerce Commission (28 M. C. C. 653), granting appellant a permit to operate as a contract carrier by motor vehicle under the Motor Carrier Act of 1935 (49 Stat. 543, 49 U. S. C. § 301), now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

Appellant filed an application for a permit as a contract carrier under the "grandfather" clause of § 209(a) of the Act. That section provides that if the contract carrier or his predecessor in interest "was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time", he shall be granted a permit without more. And § 209(b) provides that the Commission "shall specify in the permit the business of the contract carrier covered thereby and the scope thereof."[2]

The Commission found that appellant was not a common carrier of general commodities but a contract carrier[3] of specified com-

[1] Secs. 210 and 238 of the Judicial Code, 28 U. S. C. § 47a, § 345.

[2] Sec. 209(b) also provides that the Commission shall attach certain terms, conditions and limitations to the permit. It goes on to state, however, that those conditions shall not "restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require."

[3] The term "contract carrier" is defined by § 203(a)(15) as "any person which, under individual contracts or agreements," engages in the transportation by motor vehicle of "passengers or property in interstate or foreign commerce for compensation."

modities. It found in that connection that on and after July 1, 1935, appellant had been "in bona fide operation as a contract carrier" by motor vehicle "under individual contracts" with persons who "operate food canneries or meat-packing businesses, (a) of canned foods from Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn., and (b) of fresh meats, canned foods, dairy products, and packing-house products and supplies, from South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points in that portion of Wisconsin on and east of the Mississippi River from the intersection of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, to La Crosse, Wis., and U. S. Highway 53 from La Crosse to Cameron, Wis., and on and south of U. S. Highway 8, and (c) of the commodities described in (b) from Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis., over irregular routes;" 28 M. M. C. p. 660. The Commission accordingly found that appellant was entitled to a permit authorizing "the continuance of such operations".

Appellant's chief objection to that limitation of his rights under the "grandfather" clause is that the Commission has restricted the shippers or types of shippers for whom he may haul the specified commodities. His argument comes down to this: once the territory which he may serve and the commodities which he may haul have been determined; he should be allowed to haul these commodities for any one he chooses within those territorial limits. In the present case appellant hauled under contract miscellaneous supplies for Swift & Co. such as glue, paper, barrels, soap, bolts, thermometers, etc. His argument accordingly is that he should be allowed to haul the same items for any other person in the territory, whatever may be the business of that person and irrespective of the fact that appellant had never had any contract of carriage with him.

The Commission at one time seems to have followed that view. *Longshore Contract Carrier Application*, 2 M. C. C. 480, 481. But it no longer does. *Keystone Transportation Co. Contract Carrier Application*, 19 M. C. C. 475. In the latter case the power and duty of the Commission under § 209 (b) to specify in the permit "the business of the contract carrier covered thereby and the scope thereof" were reexamined. It was held that that phrase meant "more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in ad-

dition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier." 19 M. C. C. 493.

We agree. An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the Act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior *bona fide* operations" which is contemplated by the Act (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See § 206(a), § 207, and § 209(b).

Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its scope,[4] our function is at an end. The precise delineation of an enterprise

[4] We do not accede to the suggestion that the permit specification clause in § 209(b) is applicable only to new operators, not to "grandfather" applicants. The Commission has consistently taken the view that it covers both. Motor Convoy, Inc., 2 M. C. C. 197, 200; Wray Wible, 7 M. C. C. 165, 163;

which seeks the protection of the "grandfather" clause has been reserved for the Commission. *United States* v. *Maher*, 307 U. S. 148; *Alton R. Co.* v. *United States*, *supra*; *United States* v. *Carolina Freight Carriers Corp.*, *supra*.

We have considered the other objections raised by the appellant and find them without merit.

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

James P. Hunter, 13 M. C. C. 109, 112-113; Marine Trucking Co., Inc., 17 M. C. C. 615. That interpretation is entitled to "great weight". United States v. American Trucking Ass'ns, 310 U. S. 534, 549. It is consistent with the wording of § 209. Paragraph (a) requires a contract carrier to have a "permit" in order to operate as such; and it requires the Commission to issue the permit "without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b)" within the prescribed time limitation.